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Recent Developments

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CONSTITUTIONAL LAW — CRIMINAL PROCEDURE — OMNIBUS CRIME CONTROL ACT OF 1968 — GRAND JURY WITNESS WHO HAS BEEN GRANTED TRANSACTIONAL IMMUNITY MAY REFUSE TO ANSWER QUESTIONS WHICH ARE BASED UPON INFORMATION DERIVED FROM UNAUTHORIZED ELECTRONIC SURVEILLANCE.

In re Egan (3d Cir. 1971)

Sister Joques Egan was called to testify as a witness before a federal grand jury.[1] Upon the Sister's refusal to testify on fifth amendment grounds, the Government served her with a grant of "transactional immunity."[2] When she appeared before the grand jury again, Sister Egan refused to testify on several grounds, one being that the information which prompted the Government to subpoena her, and which was used to formulate questions presented to her, had been obtained through illegal wiretapping and electronic surveillance. She was then brought before the United States District Court for the Eastern District of Pennsylvania and instructed to answer the questions. Upon her refusal, Sister Egan was held in contempt. Initially, a three-judge panel of the United States Court of Appeals for the Third Circuit affirmed,[3] but upon rehearing en banc, the Third Circuit vacated the contempt citation and remanded the case,[4] *holding* that section 2515 of the Omnibus Crime Control and Safe

1. The grand jury was investigating an alleged plot to kidnap a high public official, to destroy government property, and to commit several other federal offenses. An indictment had been returned against six defendants, naming Sister Egan as a co-conspirator but not as a co-defendant.

2. Sister Egan was granted immunity in accordance with the Omnibus Crime Control and Safe Streets Act of 1968, tit. III, § 2514, 18 U.S.C. § 2514 (1970). The Act provides that a grand jury witness who is compelled to testify cannot be prosecuted on account of any matter to which his testimony related, and that such testimony cannot be used as evidence in a criminal proceeding against the witness. As a result of this immunity, Sister Egan could not be prosecuted in relation to any offense which the grand jury was then considering.

3. The panel held that: (1) the alleged procedural and constitutional defects attending the application for immunity and the contempt hearing did not deprive Sister Egan of due process; (2) the scope of the immunity granted to her extended to all crimes then under investigation; and (3) a witness before a grand jury lacks standing under the fourth amendment to complain of any illegal electronic surveillance, since the scope of the grand jury as an investigative tool should not be restricted and because sufficient protections would be available should the witness become a defendant in a criminal trial. *In re* Egan, No. 71-1088 (3d Cir., Mar. 2, 1971), *rev'd,* 450 F.2d 199 (3d Cir.) (en banc), *cert. granted,* 40 U.S.L.W. 3279 (U.S. Dec. 14, 1971) (No. 71-263).

4. The case was remanded to the district court for a hearing to determine whether the questions propounded to Sister Egan resulted from, or were based upon, illegal electronic surveillance directed at her. 450 F.2d at 217. Throughout its opinion, the Third Circuit assumed that the surveillance was conducted illegally.

Streets Act of 1968[5] is an express prohibition against the use, before a grand jury, of evidence derived from oral communications improperly obtained and, therefore, Sister Egan could properly refuse to answer any questions based upon illegally intercepted oral communications. *In re Egan,* 450 F.2d 199 (3d Cir.), *cert. granted,* 40 U.S.L.W. 3279 (U.S. Dec. 14, 1971) (No. 71-263).

Historically, the grand jury has served two functions: (1) as a body of accusers; and (2) as a protector of citizens from unfounded complaints.[6] While the English judicial system made use of the grand jury originally as an accusatory body and later as a protective body,[7] it was the latter function which the framers of the United States Constitution chose to emphasize, as evidenced by the fifth amendment.[8] Although in America the grand jury has historically been regarded as a protective body,[9] it has also served a valuable inquisitorial role.[10]

While a witness before a federal grand jury is not afforded all the rights of a defendant at trial,[11] the Supreme Court has held that the witness is entitled to the benefits of the fifth amendment's privilege against self-incrimination.[12] However, in recognition of the grand jury's in-

5. 18 U.S.C. § 2515 (1970). This section provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a state, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

6. *See, e.g.,* Hurtado v. California, 110 U.S. 516, 556-57 (1884) (Harlan, J., dissenting).

7. For a review of the English grand jury system, *see* Kennedy & Briggs, *Historical and Legal Aspects of the California Grand Jury System,* 43 CALIF. L. REV. 251, 251-58 (1955); Morse, *A Survey of the Grand Jury System,* 10 ORE. L. REV. 101, 101-18 (1931).

8. U.S. CONST. amend. V provides in pertinent part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." *See* Costello v. United States, 350 U.S. 359, 362 (1956); Note, *The Rights of a Witness Before a Grand Jury,* 1967 DUKE L.J. 97, 97-101.

9. *See, e.g.,* Wood v. Georgia, 370 U.S. 375, 390 (1962); Hurtado v. California, 110 U.S. 516, 545-48 (1884) (Harlan, J., dissenting).

10. *See, e.g., In re* Grand Jury Proceedings, 4 F. Supp. 283, 284 (E.D. Pa. 1933). One function of a grand jury is universal — the indictment of persons accused of crime upon a finding of probable cause. *See* Note, *The Grand Jury, Past and Present: A Survey,* 2 AM. CRIM. L.Q. 119, 122 (1964).

Generally, a grand jury consists of fifteen to twenty-three people of good reputation. Usually twelve members must concur in order to return a "true bill" of indictment. The body's term is set by the court; its proceedings are conducted in secrecy; strict rules of evidence are usually not adhered to; it has subpoena power, and can compel any witness, other than a defendant, to appear. The grand jury has great latitude with respect to what it may probe. Blair v. United States, 250 U.S. 273, 282 (1919); *In re* Black, 47 F.2d 542, 544 (2d Cir. 1931); United States v. Smyth, 104 F. Supp. 283, 296-98 (N.D. Cal. 1952). The grand jury itself is powerless to adjudge contempt and must depend upon a court to try and adjudge contempt proceedings. Brown v. United States, 359 U.S. 41, 49-51 (1959); Carlson v. United States, 209 F.2d 209, 212-13 (1st Cir. 1954).

11. *See, e.g., In re* Groban, 352 U.S. 330, 333 (1957) (witness before federal grand jury does not have a constitutional right to representation by counsel). *See* note 14 *infra.*

12. Counselman v. Hitchcock, 142 U.S. 547, 562-64 (1892).

vestigatory function, statutory grants of immunity have been used as an effective means of securing needed testimony.[13]

As an additional means of introducing testimony before the grand jury, the strict procedural rules normally adhered to at trial have been greatly relaxed.[14] Thus, "[t]he prevalent judicial attitude seems to be to permit the grand jury a wide and unfettered range of examination, and deny the individual witness any standing to protest the nature or scope of his testimony, so long as his privileges are not transgressed."[15] Because of its peculiar characteristics,[16] there has been much disagreement as to the applicability of the exclusionary rule in the grand jury context.[17]

13. *See* Brown v. Walker, 161 U.S. 591, 599 (1896). There, the Court held that the federal government has the power to grant immunity from future prosecution, thereby enabling it to compel a witness to make what would otherwise be incriminating statements. The Court's rationale was that the purpose of the fifth amendment is fully served by the statutory immunity.

Immunity statutes have been employed extensively in administrative agencies, congressional committees, grand juries and trial courts. *See* Note, *Federal Immunity Statutes: Problems and Proposals,* 37 GEO. WASH. L. REV. 1276 (1969). At the present time, there is a conflict among the circuit courts as to whether "use" immunity or "transactional" immunity must be given to the witness in order to effectively displace the fifth amendment's privilege. *Compare* Stewart v. United States, 440 F.2d 954 (9th Cir.), *cert. granted sub nom.* Kastigar v. United States, 402 U.S. 971 (1971), *with In re* Korman, 449 F.2d 32 (7th Cir.), *petition for cert. filed sub nom.* Korman v. United States, 40 U.S.L.W. 3059 (U.S. June 18, 1971) (No. 70-303). *See* 17 VILL. L. REV. 559 (1972).

14. For example, a witness before a grand jury cannot object to questions posed on grounds of incompetency or irrelevance. Blair v. United States, 250 U.S. 273, 282 (1919); Nelson v. United States, 201 U.S. 92, 115 (1905); United States v. McGovern, 60 F.2d 880, 888-89 (2d Cir. 1932). Nor may a witness before the grand jury challenge the authority or the jurisdiction of the grand jury, provided it has a de facto existence and organization. 250 U.S. at 282. Furthermore, indictments based on hearsay are valid. Costello v. United States, 350 U.S. 359, 363-64 (1956). Consequently, unless the witness is able to claim a privilege or object to evidence under rule 41(e) of the Federal Rules of Criminal Procedure, the prosecutor may present any evidence he desires to the grand jury. *See* notes 92-97 and accompanying text *infra. See generally* Note, *Exclusion of Incompetent Evidence from Federal Grand Jury Proceedings,* 72 YALE L.J. 590 (1963).

15. Silverstein, *Federal Grand Jury Testimony and the Fifth Amendment,* 1960 WASH. U.L.Q. 215, 216. Among the privileges which have been accorded to a witness before a grand jury are the following: (1) the husband-wife or marital privilege, Blau v. United States, 340 U.S. 332 (1951); (2) the attorney-client privilege, United States v. Judson, 322 F.2d 460 (9th Cir. 1963); (3) the physician-patient privilege, Application of Grand Jury, 286 App. Div. 270, 143 N.Y.S.2d 501 (1955); (4) the reporter's privilege, Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), *cert. granted,* 39 U.S.L.W. 3478 (U.S. May 3, 1971) (No. 70-1114). Furthermore, the Supreme Court has held that the fifth amendment's privilege against self-incrimination may be invoked by a grand jury witness. Counselman v. Hitchcock, 142 U.S. 547 (1892).

16. *See* notes 10, 11 & 14 and accompanying text *supra.*

17. *Compare In re* Fried, 161 F.2d 453 (2d Cir. 1947) *and* Foley v. United States, 64 F.2d 1 (5th Cir. 1933), *with* Centracchio v. Garrity, 198 F.2d 382 (1st Cir. 1952) *and* United States *ex rel.* Rosado v. Flood, 394 F.2d 139 (2d Cir.), *cert. denied,* 393 U.S. 855 (1968). In *Fried,* the court stated that an attempt should be made to suppress irrelevant and incompetent evidence. The court first noted that indictments inflict serious harm upon people, and until reprehensible activity on the part of government officials is eliminated, our claim to civil liberties will be an empty boast. The court realized that the judiciary could do little to reprimand such misconduct, although its powers include the ability to screen from a grand jury evidence secured by official illegality. 161 F.2d at 458-60. In *Foley,* the court stated that it could restrain aggressive or unlawful conduct by government officials through controlling, at the pre-indictment stage, the improper preparation of evidence. 64 F.2d at 3. In *Centracchio,* the court stated that permitting prospective defendants to suppress improperly obtained evidence would greatly impede the administration of criminal justice, and reasoned

Accordingly, some illegally obtained evidence is admissible in grand jury proceedings.[18]

Congressional concern with the admissibility generally of evidence obtained through illegal electronic surveillance has led to the enactment of two major pieces of legislation. The first wiretapping statute, section 605 of the Federal Communications Act of 1934,[19] prohibited the interception and publication of any telephonic communication made without the authorization of its sender. After a series of cases, the Supreme Court, in 1957, held that "[s]ection 605 contains an express, absolute prohibition against the divulgence of intercepted communications."[20] The statute has been applied to both state and federal officers,[21] as well as private persons,[22] and has included intrastate as well as interstate communications.[23] However, there have been several decisions inconsistent with the above interpretation. Specifically, the Court has created important exceptions to its "express, absolute prohibition" construction of section 605 with respect to: (1) what constituted an "interception";[24] (2) what constituted a "divulgence";[25] and (3) who had standing to object to the use of illegal wiretap evidence.[26]

Congress' second attempt to handle the electronic surveillance problem is embodied in Title III of the Omnibus Crime Control and Safe Streets

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that it would not be in the public interest to allow another dilatory motion at the pre-indictment stage. 198 F.2d at 388. The holding of *Rosado* was that a witness before a grand jury does not have the right to impede its collection of evidence by raising issues which might be meritorious if raised by an indicted defendant. 394 F.2d at 141.

18. United States v. Blue, 384 U.S. 251 (1966). The Court held that even if incriminating evidence was obtained from a defendant in violation of the fifth amendment, at most the defendant would be entitled to suppress the evidence and its fruits at trial. The Court further stated that the general common law rule is to admit evidence at a grand jury proceeding despite its illegal origins. *Id.* at 255; *accord,* Lawn v. United States, 355 U.S. 339, 348-50 (1958); Costello v. United States, 350 U.S. 359, 363-64 (1956); United States v. Schipani, 315 F. Supp. 253, 257 (E.D.N.Y. 1970). The rationale advanced for the admissibility of illegally obtained evidence is that the adherence to procedural safeguards at trial will adequately protect the accused and any interference at the grand jury stage would unnecessarily hamper its investigative function. *See* Note, *supra* note 14, at 591. *But see* notes 92-97 and accompanying text *infra.* These latter comments indicate that any "aggrieved person" may make pre-indictment motions to suppress evidence obtained in violation of his fourth amendment rights.

19. 47 U.S.C. § 605 (1964). This section provides in pertinent part:

> No person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person.

20. Benanti v. United States, 355 U.S. 96, 102 (1957).

21. Nardone v. United States, 308 U.S. 338 (1939); Nardone v. United States, 302 U.S. 379 (1937).

22. Benanti v. United States, 355 U.S. 96 (1957).

23. Weiss v. United States, 308 U.S. 321, 329 (1939). For a discussion of the *Weiss* and *Nardone* decisions, *see* notes 48 & 49 and accompanying text, *infra.*

24. *See* Rathbun v. United States, 355 U.S. 107 (1957). The *Rathbun* Court concluded that listening in on a conversation by means of a regularly used extension phone did not constitute "interception" of that conversation. *Id.* at 109. *See* notes 48 & 49 *infra.*

25. *See* Goldman v. United States, 316 U.S. 129 (1942); Goldstein v. United States, 316 U.S. 114 (1942).

26. *See* Goldstein v. United States, 316 U.S. 114 (1942). For a discussion of the cases interpreting section 605, *see* notes 48 & 49 and accompanying text *infra.*

Act of 1968.[27] Title III is a comprehensive ban of all unauthorized electronic surveillance, and the interception of wire or oral communications is authorized only when it is made pursuant to a court order issued upon a showing of probable cause.[28] Unless so authorized, the information obtained via the surveillance is inadmissible in any judicial proceeding, including a grand jury.[29] Title III also provides that any "aggrieved person,"[30] in any trial or other judicial proceeding, may move to suppress evidence obtained in violation of the Act.[31]

The question of whether a grand jury witness has standing, under section 605 or under Title III, to suppress evidence illegally obtained has not been considered by many courts.[32] Prior to *In re Egan,* only two courts had addressed this question specifically, and both had held that the witness lacked the requisite standing.[33]

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27. 18 U.S.C. §§ 2510 to 2520 (1970). Title III supersedes section 605 of the Federal Communications Act of 1934, 47 U.S.C. § 605 (1964). *See* Note, *Wiretapping and Electronic Surveillance — Title III of the Crime Control Act of 1968,* 23 RUTGERS L. REV. 319, 326 (1969).

28. 18 U.S.C. §§ 2516, 2518 (1970).

29. 18 U.S.C. § 2515 (1970). *See* note 5 *supra.*

30. 18 U.S.C. § 2510(11) (1970), provides:

"[A]ggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

31. 18 U.S.C. § 2518 (10)(a) (1970), provides in pertinent part:

Any aggrieved person in any trial, hearing, or proceeding in or before any court . . . or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom. . . .

32. Standing involves the question of whether the person making the motion is the "proper party to raise the claim of illegality and to seek the remedy of exclusion." Grove, *Suppression of Illegally Obtained Evidence: The Standing Requirement on its Last Leg,* 18 CATH. U.L. REV. 150 (1968). The Supreme Court has stated:

[T]he nexus between the status asserted by the litigant and the claim he presents are essential to assure that he is a proper and appropriate party to invoke federal judicial power.

Flast v. Cohen, 392 U.S. 83, 102 (1968).

With respect to the fourth amendment, the standing requirement is justified on the grounds that the deterrent effect of the exclusionary rule will be only marginally advanced, and the public interest disproportionately injured, by allowing every such person to suppress. Alderman v. United States, 394 U.S. 165, 174–75 (1969). For a discussion of the exclusionary rule and the standing requirement, *see* Note, *Eavesdropping and the Constitution: A Reappraisal of the Fourth Amendment Framework,* 50 MINN. L. REV. 378 (1965).

33. Carter v. United States, 417 F.2d 384 (9th Cir. 1969), *cert. denied,* 399 U.S. 935 (1970); United States *ex rel.* Rosado v. Flood, 394 F.2d 139 (2d Cir.), *cert. denied,* 393 U.S. 855 (1968).

In *Rosado,* the petitioner was granted immunity and compelled to testify. Nevertheless, Rosado refused to answer the prosecutor's questions, claiming that the information upon which the questions were based was secured when the Government intercepted messages to which he was a party, thereby violating section 605 of the Federal Communications Act. The court held that:

[A] witness usually cannot impede collection of evidence by the grand jury even though the issues he seeks to raise could later be litigated — perhaps with success — by an indicted defendant . . . .

Id. at 141.

Carter presented a factual situation very similar to *Rosado* and *In re Egan.* Though the court's broad language denied a grand jury witness the right to suppress in accordance with section 2518(10)(a), (*see In re* Shead, 302 F. Supp. 569, 570–71 (N.D. Cal. 1969)), the situation differed in one significant aspect; namely, the petitioner was vicariously asserting a fourth amendment violation. *Cf.* United

In holding that 18 U.S.C. § 2515 is an express prohibition against the use, before a grand jury, of evidence derived from the contents of oral communications improperly obtained, the *Egan* court reviewed Congress' purpose in passing Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[34] The court recognized that the Act had a dual purpose: (1) to protect the privacy of wire communications; and (2) to preserve the integrity of the judicial system by excluding illegally obtained evidence.[35] Further, the court stated that Congress, in order to effectuate this two-fold purpose, adopted, in section 2515, the judicially approved practice of not only excluding from use as evidence the contents of the illegally obtained communication, but also prohibiting the Government from using any and all information derived therefrom.[36] Once stating the dual

States v. Gelbard, 443 F.2d 837 (9th Cir. 1971), *cert. granted,* 40 U.S.L.W. 3279 (U.S. Dec. 14, 1971) (No. 71-110); United States v. Weinberg, 439 F.2d 743 (9th Cir. 1971); Dudley v. United States, 427 F.2d 1140 (5th Cir. 1970).

Within two months of the date of the Third Circuit's decision in *In re Egan,* the exact question presented in the instant case was considered by two other circuits. *Compare In re* Bacon, 446 F.2d 667 (9th Cir. 1971) (rejecting petitioner's contention that 18 U.S.C. § 2518(10)(a) grants a grand jury witness standing to make a motion for the suppression of unlawfully obtained oral communications), *with In re* Evans, ____ F.2d ____ (D.C. Cir. 1971), *petition for cert. filed,* 40 U.S.L.W. 3091 (U.S. Aug. 20, 1971) (No. 71-256) (holding that a grand jury witness does have the right, under 18 U.S.C. § 2518(10)(a), to make a motion for the suppression of unlawfully obtained oral communications).

34. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 to 2520 (1970). For the legislative history of the Act, *see* S. REP. No. 1097 & H. REP. No. 488, 90th Cong., 2d Sess. (1968), 2 U.S. CODE CONG. & AD. NEWS 2112-2309 (1968).

35. 450 F.2d at 209. To support this conclusion, the court relied on section 801 of Title III, which provides in part:

> (b) In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings . . . it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized. . . .
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> . . . .
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> (d) To safeguard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction. . . . Interception of wire and oral communications should further be limited to certain major types of offenses. . . .

18 U.S.C. § 2510 (1970). Furthermore, an examination of the legislative history of the Act amply supports the court's view of the Act's purposes. *See, e.g.,* S. REP. No. 1097, 90th Cong., 2d Sess. 10 (1968); 2 U.S. CODE CONG. & AD. NEWS 2112, 2156, 2184-85 (1968).

36. 18 U.S.C. § 2515 (1970). *See* note 5 *supra.* In Olmstead v. United States, 277 U.S. 438 (1928), the plea for the Government to refrain from exploiting its own illegality was eloquently stated by Mr. Justice Brandeis:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. . . . If the Government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of criminal law the end justifies the means — to declare that the Government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

Id. at 485 (dissenting opinion). Mr. Justice Brandeis' view has been cited repeatedly with approval. *See, e.g.,* Elkins v. United States, 364 U.S. 206, 223 (1960). This same position was recently reflected by the Court in Terry v. Ohio, 392 U.S. 1, 13 (1968) (by excluding illegally obtained evidence, the Court refused to legitimize unlawful police action by withholding the "constitutional imprimatur").

purpose of the Act and the method adopted for its accomplishment, the *Egan* court had little difficulty in concluding that in the instant case, the district court had an absolute duty to follow the express direction of Congress, as found in section 2515.[37] In ordering Sister Egan to answer questions which might have been based upon information obtained through illegal wiretapping and electronic surveillance, the district court had acted inconsistent with the legislative command and contra its duty under the statute.

The *Egan* court found support for its interpretation of section 2515 in the case of *Nardone v. United States.*[38] In *Nardone,* federal agents, by tapping telephone wires, had obtained information incriminating petitioners. The agents later testified in court as to what they had heard. The Supreme Court ruled that the agents had violated section 605 of the Communications Act of 1934, reasoning that the "plain words" of that section forbade the divulgence of the intercepted communication. Relying on its supervisory powers, the *Nardone* Court held that any evidence obtained by any person, including federal agents, in violation of section 605 was inadmissible in a federal court.[39] The *Egan* court stated that section 2515 is a much stronger prohibition against the use of the contents of illegally intercepted oral communications than is section 605; the former expressly excludes such evidence from a criminal proceeding, whereas the exclusion in *Nardone* was accomplished through the Court's use of its supervisory powers.[40]

Finally, the *Egan* court rejected the Government's contention that the grant of transactional immunity under section 2514 deprived Sister Egan of standing to raise section 2515 as a bar to the use of the intercepted communication. The court reasoned that although Sister Egan could no longer complain of any fifth amendment violations, being fully protected by the immunity provided her, it would be a *non sequitur* to conclude that she had also lost her right to complain of fourth amendment violations. The Sister retained a substantial interest in preventing the Government from exploiting her illegally invaded privacy by using the fruits thereof, and consequently could complain of the Government's misconduct.[41]

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37. 450 F.2d at 209.

38. 302 U.S. 379 (1937) (hereinafter referred to as *Nardone I*).

39. *Id.* at 382. *Nardone I* was subsequently relied upon by the Court in Benanti v. United States, 355 U.S. 96, 99 (1957), which held that evidence obtained through illegal wiretaps conducted by state officials was inadmissible in a federal criminal proceeding. The Court stated:

> The crux of those decisions [*Nardone* and *Schwartz*] . . . is that the plain words of the statute created a prohibition against any person violating the integrity of a system of telephonic communication and that evidence obtained in violation of this prohibition may not be used to secure a federal conviction.

355 U.S. at 100. In *Schwartz,* the Supreme Court had held that evidence obtained from unlawful wiretapping conducted by state agents was admissible in state criminal proceedings. Schwartz v. Texas, 344 U.S. 199 (1952). The *Schwartz* decision was expressly overruled by Lee v. Florida, 392 U.S. 378, 385 (1968).

40. 450 F.2d at 210. *See* note 5 *supra.*

41. 450 F.2d at 210.

The reasoning advanced by *Egan* in rejecting the Government's contention that the granting of immunity cured any fourth amendment violations is undoubtedly sound. Immunity serves to displace the fifth amendment privilege against self-incrimination, not the fourth amendment right to be free from unreasonable searches and seizures. The fourth amendment serves a dual purpose: it protects against unreasonable searches and seizures *and* prevents governmental use of the fruits of such unlawful activity.[42] Accordingly, the Government had violated the amendment at the time of the unauthorized electronic surveillance, and Sister Egan had a right to complain of this accrued violation. The grant of immunity which precluded her prosecution would not be an adequate means of vindicating her rights. The court's reasoning is in accordance with Title III which, with regard to electronic surveillance, has substantially the same purposes as the fourth amendment.[43] Moreover, if the Government's argument is accepted, the Government can invade citizens' privacy at will, so long as they are granted immunity from prosecution. Such a result would be directly contrary to the purpose of both the fourth amendment and Title III of the Omnibus Crime Control Act.

While the majority's opinion is apparently in accord with the congressional purpose,[44] the *Egan* court has left its ruling susceptible to attack by deciding the issue on such narrow grounds. Several problems remain unanswered if section 2515 is interpreted as totally prohibiting the use of illegally intercepted oral communications. For example, section 2518(10)(a)[45] limits those who may make a motion to suppress illegally obtained wiretap evidence. By reading section 2515 to be a flat all-inclusive prohibition, the majority in *Egan* has implicitly overruled the limitations of section 2518(10)(a), since section 2515 declares that all such illegal evidence shall be excluded without defining those who have standing to suppress it and irrespective of whether the movant is within the pro-

42. In Mapp v. Ohio, 367 U.S. 643 (1961), the Court stated that the fourth amendment protects: (1) a man's home from unlawful invasions; and (2) the man from the use of evidence against him obtained as a result of such invasions. *Id.* at 656-57. While the fifth amendment has been likened to the fourth amendment, (*see* Boyd v. United States, 116 U.S. 616, 633, (1968)), and the fourth amendment cannot be interpreted as establishing a general "right to privacy," (*see* Katz v. United States, 389 U.S. 347 (1967), *noted in* 13 VILL. L. REV. 643 (1968)), it is submitted that the privacy granted by the fourth amendment is more comprehensive than any privacy afforded by the fifth amendment. For example, the fourth amendment protects a citizen from intrusion by the Government any time he has a subjective expectation of privacy and he justifiably relies upon that expectation, (*see* Katz v. United States, 389 U.S. 347, 361 (Harlan, J., concurring)), while the fifth amendment's protection attaches only when he is asked a potentially incriminating question. *Cf.* Camera v. Municipal Court, 287 U.S. 523, 530 (1967). Also, the fourth amendment protects against both the unlawful invasion and the consequences of such action, (*see* Mapp v. Ohio, 367 U.S. 643 (1961)), whereas the fifth amendment only protects against the introduction, at trial, of the fruits of such an invasion. *See* note 35 and accompanying text *supra.*

43. *See* note 35 and accompanying text *supra.*

44. *Id.*

45. Section 2518(10)(a) limits those who may make a motion to suppress to "aggrieved persons." 18 U.S.C. § 2518(10)(a) (1970). *See* note 31 *supra.* For a discussion of this limiting phrase, *see* notes 60-91 and accompanying text *infra.*

visions of section 2518(10)(a).[46] Secondly, the *Egan* court has totally ignored the legislative history of Title III. While the history does not clearly express the congressional intent, it contains several statements which warranted comment,[47] especially in view of the possibly conflicting commands of sections 2515 and 2518(10)(a). Finally, the court's succinct reliance on *Nardone,* while sound, failed to recognize the exceptions to the *Nardone* rule[48] and to explain why *Nardone* rather than its exceptions

46. The court based its opinion that the judgment of contempt should be vacated on the fact that the district court did not follow the express mandate of section 2515, totally ignoring the fact that the district court had an obligation to follow the express mandate of section 2518(10)(a), as well as that of section 2515. Of course, if the district court were to follow section 2518(10)(a), it would have to decide whether Sister Egan, as a grand jury witness who has been granted transactional immunity, falls within the limiting phrase "aggrieved person," since only an "aggrieved person" may suppress in accordance with section 2518(10)(a). Furthermore, since the Supreme Court, in *Alderman,* has stated that the phrase "aggrieved person" in section 2518(10)(a) is to be interpreted in accordance with the case law construing rule 41(e) of the Federal Rules of Criminal Procedure, the *Egan* court, by relying solely upon section 2515, has avoided the problem of determining whether a grand jury witness has standing, under existing case law, to make a pre-indictment motion to suppress. Alderman v. United States, 394 U.S. 165, 175 n.9 (1969). *See* note 91 *infra.*

47. *See* notes 60–82 and accompanying text *infra.*

48. The *Nardone* rationale was subsequently reiterated in the second *Nardone* case. Nardone v. United States, 308 U.S. 338 (1939) (hereinafter referred to as *Nardone II*). In *Nardone II,* federal agents intercepted telephone messages and the Government used this evidence at petitioner's trial. The Court held that even though nothing in the language of section 605 of the Communications Act of 1934 would prohibit the Government's actions, in order to effectuate the policy which Congress had formulated both direct and indirect uses of the illegally obtained evidence must be forbidden. *Id.* at 340. The *Nardone II* rationale was applied and extended in Weiss v. United States, 308 U.S. 321 (1939). In *Weiss,* intrastate telephone communications were intercepted by federal agents and used to obtain confessions from co-conspirators of the petitioner. These co-conspirators were permitted to testify as to the contents of the intercepted messages at the petitioner's trial. The Court held that such governmental use of the intercepted messages violated the Act since section 605 applied to intrastate as well as interstate communications.

However, the rationale of the *Nardone* decisions has not been so clearly applied in later cases. For example, in Goldstein v. United States, 316 U.S. 114 (1942), federal agents illegally tapped the telephone conversations of two of petitioner's co-conspirators. When these co-conspirators were confronted with the illegally obtained information, they agreed to become state witnesses and were allowed to testify at Goldstein's trial. The Court distinguished the *Nardone* cases on the tenuous grounds that the wiretapped information was not introduced at trial and the witnesses did not testify as to the existence or content of the wiretapped messages. *Id.* at 118–19. Justice Murphy, dissenting, criticized the Court's distinction. *Id.* at 122. The Court in *Goldstein* held that testimony induced by unlawfully intercepted messages was admissible against a person not a party to the conversation, even though the wiretaps had been illegal.

Approximately the same time that *Goldstein* was decided, the official position of the Department of Justice and the FBI became known. Both agencies took the position that section 605 did not prohibit wiretapping per se, but only wiretapping that was followed by "divulgence" or "publication," and, further, that use of the wiretap information within government agencies was not a "divulgence." *See, e.g.,* Brownell, *The Public Security and Wire Tapping,* 39 CORNELL L.Q. 195, 197–99 (1954); Rogers, *The Case for Wire Tapping,* 63 YALE L.J. 792, 793 (1954). This position has never been questioned by the Court, even though substantially the same problem raised by this practice was presented to the Court in *Goldstein.* 316 U.S. at 122. For a criticism of the Government's position, *see* Donnelly, *Comments and Caveats on the Wire Tapping Controversy,* 63 YALE L.J. 799, 799–802 (1954).

The third major qualification of the rule and reasoning of the *Nardone* cases was created in Rathbun v. United States, 355 U.S. 107 (1957). In that case, the Court held that there was no "interception" of a telephone message when wire-

was followed.[49]

Although the vacating of Sister Egan's contempt citation was based upon the foregoing reasoning, all eight judges, in various combinations, advanced other lines of reasoning either in support of, or contra to, Sister Egan's position.[50]

Judge Rosenn, in his concurring opinion, asserted that it was unnecessary to reach the constitutional issue involved[51] and preferred to predicate his conclusions upon the express language of three provisions of Title III: (1) section 2510(11),[52] which defines "aggrieved person;" (2) section 2515,[53] which forbids the use before a grand jury of evidence secured through unlawful electronic surveillance; and (3) section 2511(1)(c),[54] which makes it unlawful to disclose, or attempt to disclose, information obtained through unlawful electronic surveillance. Judge Rosenn concluded that when the Government attempted to disclose information obtained through unlawful electronic surveillance, by interrogation of Sister Egan based upon this information, it violated section

tapping was done with the consent of one of the parties to the telephone conversation. The *Rathbun* majority reasoned that "one party may not force the other to secrecy merely by using a telephone." *Id.* at 110. The dissenting justices maintained that the wording of section 605 forbade any divulgence "not authorized by the sender." *Cf.* Alderman v. United States, 394 U.S. 165 (1969) (holding that one may not object to the use of evidence obtained through illegal electronic surveillance unless his own fourth amendment rights had been violated by the surveillance).

49. The holdings of the *Nardone* cases established a broad, all-inclusive rule prohibiting both direct and indirect use of illegally obtained information through wiretapping. Even though in subsequent cases the Court qualified its holdings in *Nardone I* and *Nardone II,* it has never allowed the Government to use wiretap information either directly or indirectly against a surveilled person in a judicial proceeding, except in the *Rathbun* case, where the Court found that one party to the conversation had consented to the wiretap. Thus, while the Court has loosened the concept of "divulgence" and thereby permitted the Government to make use of wiretap information outside of a judicial proceeding, the *Nardone* rationale would still cover the factual situation presented in the instant case; that is, the use by the Government of unlawfully obtained evidence in a judicial proceeding against the victim of the Government's illegality.

50. Four judges (Hastie, Rosenn, Seitz and Van Dusen) agreed with the majority opinion; that is, part II of Judge Adams' opinion. Three judges (Hastie, Seitz and Van Dusen) agreed with the concurring opinion of Judge Rosenn. Only Chief Judge Hastie agreed with parts I and III of Judge Adams' opinion. Judges Aldisert and Forman concurred in the dissenting opinion of Judge Gibbons.

51. 450 F.2d at 218. Judge Adams, in part III of his opinion in which Chief Judge Hastie concurred, also discussed the issue of whether Sister Egan had a constitutional right to refuse to answer the Government's questions. 450 F.2d at 210–17. *See* notes 98–112 and accompanying text *infra.*

The majority opinion and the concurring opinion of Judge Rosenn agreed that: (1) the court's decision was in keeping with the purposes and spirit of the legislation; (2) the court's decision would discourage governmental and judicial misconduct; and (3) the granting of immunity did not cure any fourth amendment violations. 450 F.2d at 220–21.

52. 18 U.S.C. § 2510(11) (1970). *See* note 30 *supra.* While Judge Rosenn recognized that "aggrieved person" is to be interpreted according to the existing standing rules, (*see* notes 83–91 and accompanying text *infra*), he had little difficulty in including Sister Egan, a non-defendant witness before an investigating grand jury, within this definition. Although Judge Rosenn made no attempt to demonstrate the validity of this conclusion, it would appear that a non-defendant witness may be an "aggrieved person" under existing standing rules. *See* notes 83–91 & 98–112 and accompanying text *infra.*

53. 18 U.S.C. § 2515 (1970). *See* note 5 *supra.*

54. 18 U.S.C. § 2511(1)(c) (1970).

2511(1)(c), and thereby triggered the evidentiary sanction of section 2515 which forbade such disclosure or questioning.[55]

Next, the concurring opinion addressed the Government's contention that section 2518(10)(a) did not provide a grand jury witness with standing to make a motion to suppress. Judge Rosenn commented that even if section 2518(10)(a) were unavailable to a grand jury witness, the facts of the instant case required the vacating of Sister Egan's contempt citation.[56] Judge Rosenn reasoned that when the Government attempts to elicit testimony directly from an "aggrieved person," as opposed to introducing information by other means, such a person may refuse to testify pursuant to section 2515 and cannot be held in contempt for his refusal.[57] Therefore, Judge Rosenn concluded that, regardless of whether section 2518(10)(a) provided standing, section 2515 prevented Sister Egan, as an "aggrieved person," from being compelled to answer questions which were based on information obtained through the unlawful electronic surveillance.[58]

Although the reasoning of Judge Rosenn's concurring opinion is more comprehensive than that of the majority, and more persuasive, certain questions remain unresolved. For instance, a grand jury witness is given standing to object, without an attempt on the part of either the majority or concurring opinion to explain the effect of the limitations found in section 2518(10)(a). Secondly, the concurring opinion placed the attempted elicitation of the contents of an intercepted message from an aggrieved person himself on a special plateau, without any explanation for the distinction between that situation and the introduction of the information by other means. Moreover, it is difficult to understand the relevance of such a distinction. If section 2515 is to stand alone as the basis for the majority and concurring opinions, then that section would bar the admission and use of *any* evidence obtained in violation of the wiretapping provisions of Title III, and there would, or should, be no difference whether the person moving to suppress that evidence is or is not the vehicle through which the Government seeks to introduce the evidence. Finally, Judge Rosenn stated that the rule of the instant case was merely that "aggrieved persons" can not be forced to testify under these circumstances, thereby

55. 450 F.2d at 218.

56. *Id.* at 219.

57. *Id.* Judge Rosenn concluded that this constituted the rule of the case. However, this "rule" is enigmatic. Nothing in section 2515 differentiates between the "aggrieved person" and the evidence itself. Furthermore while section 2511(1)(c) prohibits one from wilfully disclosing information unlawfully obtained, section 2511(d) permits one who was a party to the conversation to divulge its contents. A possible basis for Judge Rosenn's statement is that compounding the invasion of a person's privacy by compelling him to reveal the message's contents himself would be an added infringement upon his rights and, therefore, should not be allowed.

Although the holding of every case is limited somewhat by the factual situation presented in that case, the *Egan* court did not state that their holding was to be restricted to the "rule" stated by Judge Rosenn. In fact, the majority opinion, if taken in its full import, would make no distinction on the basis of whether the "aggrieved person" is, or is not, before the grand jury.

58. 450 F.2d at 219–20.

disavowing a broad interpretation of the majority opinion which would prohibit the introduction of the evidence through any means.

While the majority opinion found it unnecessary to decide either the constitutional issue involved or the questions concerning section 2518(10)(a) and the Act's legislative history, and the concurring opinion ignored the constitutional question presented by the instant case, five judges addressed these problems specifically. On both issues, the judges disagreed.[59]

Since Sister Egan, in her capacity as a witness before an investigating grand jury, had attempted to prevent the use of information obtained through allegedly illegal electronic surveillance of her conversations, the first major question raised by the facts was whether a grand jury witness has standing to make a motion to suppress under section 2518(10)(a). This section is the appropriate statutory provision under which an aggrieved person may attempt to suppress evidence excludable by section 2515. However, a reading of the text and legislative history of section 2518(10)(a) reveals two problems. First, while section 2515 states specifically that information obtained in violation of the Act may not be received in evidence before a grand jury,[60] section 2518(10)(a) does not expressly include the grand jury as an appropriate forum for the making of a suppression motion.[61] Secondly, the legislative history of section 2518(10)(a) states: "[b]ecause no person is a party as such to a grand jury proceeding, the provision does not envision the making of a motion to suppress in the context of such a proceeding itself."[62] Judge Gibbons in his dissenting opinion argued that by reading the language of section 2518(10)(a) and its legislative history together, the congressional intent that the grand jury be permitted to consider the improperly obtained evidence was made apparent.[63]

With respect to the first problem, Judge Adams asserted that the absence of the words "grand jury" in section 2518(10)(a) was of no conse-

59. Judge Hastie concurred with Judge Adams in parts I and III of his opinion. Judges Aldisert and Forman concurred with Judge Gibbons in dissent. The reasoning of Judge Adams is particularly important since his opinion answers many of the questions which the majority opinion raises. Thus, it is Judge Adams' reasoning that provides the justification or legitimacy for the majority's decision. Part I of Judge Adams' opinion, dealing with the application and legislative history of sections 2515 and 2518(10)(a), takes on added significance since Chief Judge Bazelon, in writing the opinion of the court in *In re* Evans, ... F.2d ..... (D.C. Cir. 1971), *petition for cert. filed,* 40 U.S.L.W. 3091 (U.S. Aug. 20, 1971) (No. 71-256), relied very heavily upon the reasoning advanced by Judge Adams in this portion of his opinion.

60. 18 U.S.C. § 2515 (1970). *See* note 5 *supra.*

61. 18 U.S.C. § 2518(10)(a) (1970). *See* note 31 *supra.*

62. S. REP. No. 1097, 90th Cong., 2d Sess. 106 (1968), 2 U.S. CODE CONG. & AD. NEWS 2112, 2195 (1968).

63. Judge Gibbons noted that section 2518(10)(a) reads "[a]ny aggrieved person in any trial, hearing" and reasoned that since a person in a trial is referred to as a "party," section 2518(10)(a) was meant to include "aggrieved parties" only. Furthermore, Judge Gibbons stated, a witness before a grand jury is not a "party," citing Blair v. United States, 250 U.S. 273 (1919). When the judge combined this analysis with the statement in the legislative history that section 2518(10)(a) was not envisioned for use in a grand jury proceeding, he concluded that the congressional intent to exclude the suppression motion at a grand jury proceeding became evident. 450 F.2d at 228-30.

quence, noting that the general language of the section read: "any aggrieved person [may make a suppression motion] in any . . . hearing or proceeding . . . before any . . . authority of the United States. . . ."[64] A grand jury operates under the "authority of the United States" and consequently is included within the general language of the section.[65] Next, Judge Adams observed that Sister Egan was an "aggrieved person" according to the statutory definition contained in section 2510(11),[66] since she was a party to the intercepted communication and was the person against whom the interception was directed. Therefore, he concluded, the absence of the words "grand jury" from section 2518(10)(a) was not meant to preclude an "aggrieved person" from making a motion to suppress in such a proceeding if the prohibition of section 2515 was about to be violated.

Satisfied that Sister Egan, as an "aggrieved person," could move to suppress illegally obtained surveillance evidence in a grand jury proceeding pursuant to section 2518(10)(a), Judge Adams faced the more formidable problem presented by the legislative history. After a careful analysis of what had been said concerning section 2518(10)(a),[67] the judge concluded that the history was ambiguous and therefore not dispositive of the issue of whether Sister Egan could use the section.

Although the legislative history declared that a suppression motion was not meant to be made in a grand jury proceeding, Judge Adams observed that confusion resulted when this statement was juxtaposed with the sentence that followed it in the Senate report and which stated that normally all relevant evidence may be presented to the grand jury.[68] Judge Adams reasoned that the qualifying word, "normally," implied exceptions, and supported this analysis by reference to several situations in which relevant evidence may be excluded from grand jury proceedings. For example, the witness need not give testimony that would be self–

64. 18 U.S.C. § 2518(10)(a) (1970). *See* note 31 *supra.*

65. Hale v. Henkel, 201 U.S. 43 (1906). There, the Court held that the examination of witnesses before a grand jury is a "proceeding" within the meaning of a provision which declared that "no person shall be prosecuted . . . in any proceeding . . ." under certain acts. *Id.* at 66. The Court declared that "[t]he word [proceeding] should receive as wide a construction as is necessary to protect the witness in his disclosures . . . ." *Id.* at 66. In Cobbledick v. United States, 309 U.S. 323, 327 (1940), the Court stated that "[t]he Constitution itself makes the grand jury a part of the judicial process." In any event, federal law defines the proceedings in which a motion to suppress may be made and specifically includes a grand jury as an appropriate forum for a motion to suppress. 18 U.S.C. § 3504(a)(1) (1970).

66. 18 U.S.C. § 2510(11) (1970). *See* note 30 *supra.*

67. The passage in the legislative history which "explained" the scope of section 2518(10)(a) reads in pertinent part:

> This provision must be read in connection with sections 2515 and 2517, discussed above, which it limits. It provides the remedy for the right created by section 2515. Because no person is a party as such to a grand jury proceeding, the provision does not envision the making of a motion to suppress in the context of such a proceeding itself. Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforcible by an individual. (Blue v. United States, 86 S. Ct. 1416, 384 U.S. 251 (1965)). There is no intent to change this general rule.

S. REP. No. 1097, 90th Cong., 2d Sess. 106 (1968), 2 U.S. CODE CONG. & AD. NEWS 2112, 2195 (1968).

68. *See* note 67 *supra.*

incriminating;[69] certain witnesses may move to suppress evidence in accordance with rule 41(e) of the Federal Rules of Criminal Procedure;[70] and the common law privileges of husband–wife, attorney–client, and physician–patient may prevent the grand jury from hearing relevant evidence.[71] The conclusion drawn by Judge Adams was that if common law doctrines, such as the privileges last mentioned, are sufficient to permit a grand jury witness to refuse to testify in certain limited situations, a similar result was compelled by an express statutory command that certain evidence be excluded — section 2515.[72] Furthermore, with respect to the reference in the legislative history to *United States v. Blue*,[73] purportedly supportive of the general rule regarding the admissibility of all evidence before a grand jury, it was reasoned that since *Blue* involved an alleged violation of the fifth amendment and a subsequent motion to quash an indictment, it was inapposite to the facts of the instant case.[74]

Judge Adams' analysis of the legislative history's explanation of section 2518(10)(a) adequately displays the confusion inherent in the Senate report. Not only does the legislative history fail to qualify the overly broad statement as to the admissibility of evidence before a grand jury,[75] but a literal reading of its explanation would create an anomaly in the Act.[76] It is apparent that section 2515 excludes from the grand jury's consideration evidence obtained in violation of Title III, and it is

69. Counselman v. Hitchcock, 142 U.S. 547 (1892).

70. FED. R. CRIM. P. 41(e). *See* notes 92–97 and accompanying text *infra*.

71. *See* note 15 *supra*. *Cf.* Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), *cert. granted*, 39 U.S.L.W. 3478 (U.S. May 3, 1971) (where a reporter was granted the qualified privilege of not revealing the sources of his information to an investigating grand jury).

72. 450 F.2d at 206.

73. 384 U.S. 251 (1966). *Blue* involved a pre-trial motion to quash an indictment because incriminating evidence had been obtained in violation of petitioner's fifth amendment privilege. The Court held that even assuming petitioner's contentions were correct, at most, *Blue* would be entitled to suppress the evidence at trial. The Court reasoned that petitioner's remedy did not extend to the barring of the prosecution altogether since the ends of the exclusionary rule would not be increased significantly by such a ruling. *Id.* at 255–56.

74. 450 F.2d at 212.

75. *See* note 15 *supra* and notes 92–97 and accompanying text *infra*.

76. Judges Gibbons, Forman and Aldisert did not address this point. The thrust of the dissenting opinion was that the majority had created a "witness–privilege" that would greatly impede the administration of criminal justice by causing excessive delay and the exclusion of relevant evidence. According to Judge Gibbons, this unqualified witness–privilege would allow the aggrieved person to testify or to withhold his testimony as he chose to do; neither the Government nor the defendant would be able to compel that person's testimony. 450 F.2d at 221–22. However, the dissent never explained why it interpreted the majority opinion as creating a witness–privilege. Although the legislative history mentions certain common law doctrines that may be used to exclude evidence from the grand jury, (*see* note 71 and accompanying text *supra*), the majority opinion made no reference to these exceptions, but instead grounded its holding solely in the wording of section 2515. Furthermore, the majority opinion did not create a witness–privilege, but, in fact, stated specifically:

> In framing the legislation in question [section 2515], Congress adopted a traditional judicial approach to Fourth Amendment problems — a prohibition against the use of evidence seized in violation of the Amendment, and also a prohibition against the use of evidence acquired by the Government as a result of the inhibited conduct.

450 F.2d at 209. Even Judge Adams in part I of his opinion specifically stated that his opinion did not create a witness–privilege. 450 F.2d at 202.

also clear that section 2518(10)(a) provides the procedure for the enforcement of the prohibition which section 2515 establishes.[77] A literal reading of the legislative history would indicate that the statute should be interpreted as meaning that a grand jury is precluded from hearing illegally obtained surveillance evidence, but that there is no means of preventing its introduction. There would be in effect a right to exclusion of the evidence but no remedy for the vindication of that right. Such an interpretation would not only invite ridicule, but would also be contrary to one of Congress' purpose in enacting Title III — the preservation of the integrity of the judicial system by the exclusion of illegally obtained evidence.[78] Accordingly, Judge Adams' interpretation of the two provisions follows the general principle of judicial construction that a statute is to be interpreted so as to give effect to all of its provisions.[79] Moreover, his reading avoids the apparent effect of the majority opinion; that is, the implied overruling of the limitations imposed by section 2518(10)(a).[80] Finally, in view of the purposes of the legislation,[81] Judge Adams has interpreted the statute in accordance with the principle expressed in *Nardone v. United States,* that "meaning must be given to what Congress has written, even if not in explicit language, so as to effectuate the policy which Congress has formulated."[82]

A related problem confronted by Judge Adams in part I of his opinion concerned the Supreme Court's reference to section 2518(10)(a) in *Alderman v. United States.*[83] In *Alderman,* the defendant had moved to suppress evidence allegedly obtained through the illegal electronic surveillance of his co-defendant. In the course of explaining its ruling that fourth amendment rights may not be vicariously asserted,[84] and therefore that the defendant lacked standing to object,[85] the *Alderman* Court stated that Congress has the authority to enact legislation abolishing the standing requirement, thereby permitting anyone to suppress improperly obtained evidence. The Court referred to section 2518(10)(a), indicating that the phrase "aggrieved person" was to be interpreted in accordance with

77. *See* notes 5, 31 & 67 *supra.*
78. *See* 18 U.S.C. § 2510 (1970); note 35 and accompanying text *supra.*
79. *See, e.g.,* Hurtado v. California, 110 U.S. 516, 534 (1886).
80. *See* notes 45 & 46 and accompanying text *supra.*
81. *See* 18 U.S.C. § 2510 (1970); note 35 and accompanying text *supra.*
82. 308 U.S. at 339.
83. 394 U.S. 165, *rehearing denied,* 394 U.S. 939 (1969).
84. *Id.* at 174-75. Fourth amendment rights are personal rights and, therefore, only that person whose personal rights have been violated by illegal government action may move for the suppression of evidence obtained thereby. For example, if the fourth amendment rights of *A* have been violated, and evidence obtained from that violation were introduced at the trial of *B, B* would have no standing to complain of the violation of *A*'s rights or to object to the introduction of the evidence. *See* note 91 *infra.*
85. The Court stated:

> [S]uppression of the product of a fourth amendment violation can be successfully urged only by those whose rights were violated by the introduction of the damaging evidence. Co-conspirators and co-defendants have been accorded no special standing.

Id. at 171-72. Faced with this clear holding, Judge Adams did not attempt to justify Sister Egan's right to move for the suppression of evidence on the basis of her status as a co-conspirator.

rule 41(e) of the Federal Rules of Criminal Procedure[86] and with existing standing rules.[87]

With respect to its applicability in the instant case, Judge Adams quickly dismissed one of the remarks of the *Alderman* Court concerning section 2518(10)(a); namely, that the section was to be construed in accordance with existing standing rules. The Supreme Court, in *Alderman*,[88] *Goldstein v. United States*[89] and *Jones v. United States*,[90] enunciated these guidelines for determining who has standing to object. However, since these cases dealt with defendants in a trial setting, Judge Adams declared them inapposite to the instant case.[91]

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86. FED. R. CRIM. P. 41(e) provides in pertinent part:
(e) Motion for Return of Property and to Suppress Evidence. — A person aggrieved by an unlawful search and seizure may move the district court . . . for the return of the property and to suppress for use as evidence anything so obtained . . . .
87. 394 U.S. at 175 n.9.
88. 394 U.S. 165 (1969).
89. 316 U.S. 114 (1942).
90. 362 U.S. 257 (1960).
91. In *Jones*, the Court stated:
In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search and seizure, one against whom the search was directed . . . .
362 U.S. at 261. The following language appears in the *Goldstein* opinion:
It has long been settled that evidence obtained in violation of the prohibition of the Fourth Amendment can not be used in a prosecution against the victim of the unlawful search and seizure if he makes timely objection.
316 U.S. at 120. *See* note 85 *supra*.
The major factual distinction between these cases and the instant case is that the three Supreme Court cases dealt with a defendant in a criminal trial, while the instant case concerned an unindicted and unindictable witness before a grand jury. Nevertheless, the common basis of these Supreme Court cases is that in order for one to have standing, one must have had *his* personal rights *violated;* he must have been the "victim" of the illegal activity. When it is recalled that the purpose of the fourth amendment is to protect the individual's privacy, as well as to prevent the introduction at trial of the fruits of the invasion, (*see* note 42 *supra*), it is apparent that Sister Egan's rights were violated by the unlawful surveillance of her. Thus, she falls within the guidelines set down by the Supreme Court and should be protected from further invasions of her privacy. Sister Egan would have standing under existing standing rules. *See* notes 109–112 and accompanying text *infra*.
In declaring these cases inapposite, Judge Adams dismissed another problem raised by the legislative history. The Senate Report stated that the phrase "aggrieved person" mentioned in section 2518(10)(a) was "intended to reflect existing law," citing, *inter alia*, *Goldstein* and *Jones*. *See* S. REP. No. 1097, 90th Cong., 2d Sess. 91 (1968), 2 U.S. CODE CONG. & AD. NEWS 2179–80 (1968). Both *Goldstein* and *Jones* dealt with a defendant's right to standing. By declaring them inapposite, Judge Adams avoided the implication that Congress had intended to limit the class of persons who had a right to suppress to defendants alone. 450 F.2d at 204.
In his dissenting opinion, Judge Gibbons took the opposite view. When he read the legislative history, he understood Congress to mean that section 2518(10)(a) was to be limited to the facts of the cases mentioned; that is, the phrase "aggrieved person" was intended to include only defendants in a criminal action. 450 F.2d at 226–27. Examining this passage of the legislative history in isolation, it appears that Judge Gibbons' interpretation is the more appropriate. However, when the legislative history is viewed *in toto*, this particular passage becomes just one more instance of the confusing references contained in that history, and the interpretation of the legislative history given by Judge Adams gains more credence. *See* notes 60–82 and accompanying text *supra*. Furthermore, although reports are entitled to weight when construing a statute, the reports are not the provisions enacted by Congress. Consequently, it is the wording of the statute itself, and not the legislative history, that ultimately must be interpreted by the court. *Cf.* United States v. Oregon, 366 U.S.

Judge Adams then proceeded to analyze rule 41(e), in accordance with *Alderman's* directions. Since the rule provides the procedure through which one obtains a remedy when his fourth amendment rights have been violated, the pertinent question presented in the instant case was *who* may make use of rule 41(e). In deciding this question, Judge Adams relied principally upon two cases: *Grant v. United States*[92] and *Centracchio v. Garrity*.[93] In both cases petitioners had voluntarily furnished Internal Revenue agents with books and materials containing income tax information. When petitioners learned that the information was about to be used as the basis for indictments against them, they moved for its suppression pursuant to rule 41(e). In both cases the district courts entertained the petitioners' motion, and on appeal, both circuit courts determined that the district courts had jurisdiction to hear the motions.[94] From these cases, Judge Adams concluded that those whose fourth amendment rights have been violated may, under rule 41(e), move for the suppression of evidence obtained through the violations even prior to indictment.

An examination of the cases applying rule 41(e) leaves little doubt that the rule may be used by an "aggrieved person" prior to indictment.[95]

643, 648 (1961). *See* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538-39 (1947).

92. 282 F.2d 165 (2d Cir. 1960).

93. 198 F.2d 382 (1st Cir. 1952).

94. Grant v. United States, 282 F.2d 165 (2d Cir. 1960). In *Grant*, jurisdiction was based on Judge Hough's statement in United States v. Maresca, 266 F. 713 (S.D.N.Y. 1920):

> Whenever an officer of the court has in his possession or under his control books or papers, or (by parity of reasoning) any other articles in which the court has official interest, and of which any person (whether party to a pending litigation or not) has been unlawfully deprived, that person may petition the court for restitution. This I take to be an elementary principle, depending upon the inherent disciplinary power of any court of record . . . .
>
> . . . It is further true that the *right to move does not at all depend on the existence of this indictment; it might be made, were no prosecution pending.*

Id. at 717 (emphasis added).

After determining that the district court had jurisdiction to hear the suppression motion, the *Grant* court held that the district court's order was not appealable. 282 F.2d at 165-71.

In Centracchio v. Garrity, 198 F.2d 382 (1st Cir. 1952), the court likewise found that the district court was correct in entertaining petitioner's motion to suppress even prior to indictment, but concluded that the petition lacked equity. Therefore, it was dismissed without prejudice to renewal after indictment. *Id.* at 382-89.

95. In addition to *Grant* and *Centracchio*, the following cases have allowed an "aggrieved person" to make a suppression motion prior to indictment: Russo v. United States, 241 F.2d 285 (2d Cir. 1957); Lapides v. United States, 215 F.2d 253 (2d Cir. 1954); *In re* Fried, 161 F.2d 453 (2d Cir. 1947); Foley v. United States, 64 F.2d 1 (5th Cir.), *cert. denied*, 289 U.S. 762 (1933). *Foley*, decided prior to the enactment of rule 41(e), was based upon the court's inherent power to discipline its own officers. The following courts have held rule 41(e) applicable to pre-indictment motions for the return of property: United States v. Foley, 283 F.2d 582 (2d Cir. 1960); United States v. Bell, 120 F. Supp. 670 (D.D.C. 1954).

The case of Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931), was also cited by Judge Adams as authority for this proposition, although *Go-Bart* was decided prior to the adoption of rule 41(e). In *Go-Bart*, two employees of the company were arrested inside the company's office, and they and the premises were searched. A quantity of material was taken from both the men and the office. The two employees and the company (referred to as the "petitioners" by the Court) moved

However, all of these cases have dealt with so-called "target" or potential defendants.[96] In his opinion, Judge Adams did not consider this point significant. Rather, he impliedly equated an unindicted potential defendant with a grand jury witness who will never be a defendant — Sister Egan. Since rule 41(e) speaks only in terms of "aggrieved person," and not defendants, Judge Adams' analogy appears sound. Nevertheless, it must be recognized that the instant case is somewhat distinguishable from those cases which have construed rule 41(e), and the Supreme Court decisions involving standing, all of which were concerned with "target defendants." To that extent, Judge Adams' position may not be "in accordance with *existing* standing rules."[97]

In addition to the foregoing arguments, Judge Adams asserted that Sister Egan had a constitutional right to refuse to answer the questions propounded to her because the basis for the questions was wiretap evidence obtained in violation of the fourth amendment.[98] To support this conclusion, the judge relied primarily on *Silverthorne Lumber Co. v. United States.*[99] In *Silverthorne,* photographs and copies of documents, obtained in violation of petitioners' fourth amendment rights, were used as the basis for an indictment. The Supreme Court held that "the essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."[100] Reading *Silverthorne* literally, Judge Adams concluded that under the fourth amendment the Government could not use, in the instant case, any evidence obtained unlawfully. This conclusion would prevent the Government from asking Sister Egan any questions that were based on unauthorized electronic surveillance of her.

Judge Adams then confronted decisions of the Second and the Ninth Circuits dealing with a grand jury witness and his standing to object to the use of evidence obtained from illegal electronic surveillance. In *United States ex rel. Rosado v. Flood,*[101] the Second Circuit held that Rosado could not object to the source of the questions which the grand

for the suppression of the evidence and the return of this material prior to indictment. Although the Court recognized that the "company . . . is a stranger to the proceeding," (*id.* at 356), it enjoined the use of "papers as evidence and [ordered] the same returned to petitioners." *Id.* at 358. Despite the fact that the Court consistently referred to the "petitioners" as the ones making the motion to suppress, the Court's holding was read narrowly by Judge Gibbons in his dissenting opinion in the instant case. That is, Judge Gibbons contended that the evidence was suppressable only as to the two employees and that the company was only interested in the return of the material. 450 F.2d at 228 (dissenting opinion). *But see* DiBella v. United States, 369 U.S. 121, 131 (1962) (overruling *Go-Bart* to the extent that *Go-Bart* distinguished, for the purposes of appeal, between pre-indictment and post-indictment motions to suppress).

96. 450 F.2d at 227-28 (Gibbons, J., dissenting).

97. Alderman v. United States, 394 U.S. 165, 175 n.9 (1969) (emphasis added).

98. 450 F.2d at 210-17. In *Katz v. United States,* the Court extended the fourth amendment's coverage to include electronic eavesdropping. 389 U.S. 347 (1967).

99. 251 U.S. 385 (1920).

100. *Id.* at 392.

101. 394 F.2d 139 (2d Cir.), *cert. denied,* 393 U.S. 855 (1968). *See* note 33 *supra.*

jury wished to ask him.[102] It was the court's conclusion, with reliance being placed on the Supreme Court's portrayal in *Blair v. United States*[103] of the grand jury as a wide-ranging investigatory body, that the grand jury's scope should not be narrowed in light of its function as an investigative tool. In *Egan,* Judge Adams first attempted to distinguish *Rosado* from the present case by noting that *Rosado* involved a federal court interfering with a state grand jury.[104] Then, declaring that the Second Circuit had read *Blair* too broadly,[105] the judge refused to follow *Rosado* because, by permitting the Government to introduce illegally obtained evidence at a grand jury proceeding,[106] it conflicted with *Silverthorne*'s command that such evidence may not be used at all.

In *Carter v. United States,*[107] the Ninth Circuit, relying on *Rosado,* denied a grand jury witness standing to object to the use of alleged illegally obtained electronic surveillance evidence. Judge Adams first distinguished *Carter* on the ground that *Carter* had dealt with illegal wiretaps directed at a third person, and not at the witness, as in the instant case. Then, realizing that he must respond to the broad language in *Carter* which implied that even a grand jury witness claiming violations of his own fourth amendment rights would be denied standing because, should he become a defendant, the procedures at trial would provide ample opportunity for the suppression of illegally obtained evidence, Judge Adams refused to follow *Carter* because it too conflicted with *Silverthorne.*[108]

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102. *Id.* at 141-42.

103. 250 U.S. 273 (1919). *See* notes 10, 11 & 14 *supra.* Despite its characterization of the grand jury, the *Blair* Court was not considering what remedies a grand jury witness has when his constitutionally protected rights have been violated. Instead, the Court in *Blair* was faced with the issue of whether a grand jury witness may inquire into the constitutionality of the statute proscribing the offense being investigated by the grand jury. It was held that he could not. *Id.* at 281-83.

104. 450 F.2d at 215. Although the *Rosado* court mentioned this situation, it stated specifically that its decision did not rest upon this fact. 394 F.2d at 141.

105. Judge Adams read *Blair* narrowly, first stating that the specific holding of *Blair* was that a grand jury witness may not question the constitutionality of the statute under investigation, and then noting the section of the *Blair* opinion which stated that some testimony is excludable from a grand jury. Since some privileges may be exerted even before a grand jury, Judge Adams reasoned that the ability to raise the protection of a privilege is analogous to the ability to object to illegal evidence. *See, e.g.,* Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970) (declaring the first amendment privileges available to a news reporter); United States v. Judson, 322 F.2d 460 (9th Cir. 1963) (declaring the attorney-client privilege available to a witness).

106. 450 F.2d at 215.

107. 417 F.2d 384 (9th Cir. 1969), *cert. denied,* 399 U.S. 935 (1970). *See* note 33 *supra.* The portion of the *Carter* opinion that dealt with the witness' claim of standing was not carefully developed by the Ninth Circuit. It was an extremely short section of the opinion and its only citation in support of the proposition that a grand jury witness lacks standing to make a motion to suppress was to *Rosado.* 417 F.2d at 388. The court reasoned that the procedural safeguards at trial would adequately protect the witness' constitutional rights, should the witness become a defendant. Furthermore, as Judge Adams noted, the Ninth Circuit when presented with a very similar question in a later case, decided it on first amendment grounds, refusing to reach the question of standing and to rely on *Carter* as authority on this point. Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970). *But see In re* Bacon, 446 F.2d 667 (9th Cir. 1971), where, subsequent to *In re Egan,* the Ninth Circuit held that a grand jury witness lacks standing to suppress illegally obtained oral communications.

108. 450 F.2d at 213.

The reasoning of Judge Adams' opinion concerning the fourth amendment's applicability to witnesses before a grand jury is of special significance, since the other parts of *In re Egan* dealt only with electronic surveillance. Thus, Judge Adams attempted to justify a broad holding that would extend to all illegally obtained evidence. Unfortunately, his reliance on a literal reading of *Silverthorne* is somewhat simplistic, as that case has not received a literal application by the courts.[109] In fact, the very requirement that one must have standing before he may object to the use of evidence constitutes a limitation upon the *Silverthorne* holding.[110] Also, Judge Adams made no attempt to explain why a literal reading of *Silverthorne* should be applied to the instant case. Indeed, he did not even face the first obstacle presented by the different factual situation of *Silverthorne;* that is, that the petitioner therein had been indicted already and was not a witness, before a grand jury, who was immune from prosecution. Because Judge Adams failed to explain adequately why *Silverthorne* should control the instant case, and because he relied to a large extent on *Silverthorne* to support his conclusion, it is not likely that this portion of his opinion will be much authority to other courts faced with the problem herein presented should those courts attempt to extend to the grand jury witness the right to suppress all illegally obtained evidence.

Though Sister Egan was not a defendant in a trial, a cogent argument can be made that pursuant to the guidelines enunciated by the Supreme Court in its major standing decisions,[111] she had standing to object.[112] That is, these decisions have indicated that in order for one to have standing he must have been the victim of the illegal search and seizure and his own fourth amendment rights must have been violated thereby. In such cases, the Supreme Court made no mention of the adverse effect on the individual which occurs when that evidence is introduced in a trial. Rather, the Court focused on the movant's status at the time that the violation occurred; that is, at the time of the unlawful search and seizure. Under this test, Sister Egan, who was the victim of an unlawful search and seizure and whose personal fourth amendment rights were violated thereby, would have standing to object to the use of the unlawfully obtained evidence under existent standing rules.

109. Since 1920, when *Silverthorne* was decided, the Court has gradually developed exceptions to the rule laid down in that case. *See, e.g.,* Harris v. New York, 401 U.S. 222 (1971) (petitioner's confession, obtained in violation of *Miranda,* may be used to impeach the petitioner's credibility even where the testimony bears directly on the crimes charged); Walder v. United States, 347 U.S. 62 (1954) (under certain circumstances, illegally obtained evidence may be used by the government for impeachment purposes). *See* notes 18 & 48 and accompanying text *supra.*

110. Because a person must have standing before he may move for the suppression of evidence, the Government may make use of illegally obtained evidence against a person who does not have standing. To the extent that the Government is allowed to do this with the unlawfully obtained evidence, the *Silverthorne* prohibition "that it shall not be used at all," (251 U.S. at 392), is undermined.

111. Alderman v. United States, 394 U.S. 165 (1969); Jones v. United States, 362 U.S. 257 (1960); Goldstein v. United States, 316 U.S. 114 (1942).

112. *See* note 91 *supra.*

The issue of whether a grand jury witness has standing to object to the introduction of unlawfully obtained oral communications in a grand jury proceeding requires a re-evaluation of the benefits of the exclusionary rule. When one recognizes: (1) that the exclusionary rule is based "only on the nicest balance of competing considerations;"[113] (2) that the rule does not operate when only marginal deterrence is gained;[114] (3) the wide-ranging powers of the grand jury;[115] and (4) the possibility of suppression at trial,[116] the benefits of the exclusionary rule in this context are open to question. In the final analysis, however, the value of extending the exclusionary rule into the grand jury context must be measured by the relative losses or gains to society resulting from the rule's extension. Recognizing that the public has a right to every man's evidence,[117] and that by exclusion of probative evidence the lawbreaker may escape his punishment, the existence of the exclusionary rule is "heavily handicapped."[118] Nevertheless, it is submitted that the facts of the instant case overcome this handicap and rightfully call for the exclusion of relevant evidence in order to protect an individual's privacy.

The dangers of permitting the technique to which Sister Egan was subjected are readily apparent. In a conspiracy situation, the Government may think it well worthwhile to violate the privacy of a minor member of the conspiracy through the improper use of electronic surveillance, grant him immunity, and as a reward for its illegal actions, return indictments against the major conspirators based on the information obtained by the surveillance. If the courts were to sanction the use of this tactic, more crimes would be solved but at the expense of destroying the fourth amendment,[119] as well as the statutory scheme of the Omnibus Crime Control and Safe Streets Act. Secondly, the oft-repeated reason for allowing the grand jury to consider illegal evidence is that the victims' rights will be adequately protected at trial.[120] Yet, Sister Egan would have no opportunity for such protection because she had been granted immunity from prosecution. If she, or future witnesses like her, are to vindicate invasions of their privacy, they must be permitted to do so at the grand jury stage. Thirdly, the fact that electronic surveillance is being discussed requires the court to be especially cautious. The danger posed to a free society by the misuse of such instruments is widely acknowledged.[121] In addition to the danger of violating fourth amendment

113. Amsterdam, *Search, Seizure, and Section 2225: A Comment,* 112 U. PA. L. REV. 378, 388 (1964).
114. *See, e.g.,* Alderman v. United States, 394 U.S. 165 (1969).
115. *See* notes 10, 11 & 14 *supra.*
116. *See, e.g.,* United States v. Blue, 384 U.S. 251 (1966).
117. United States v. Bryan, 339 U.S. 323, 331-32 (1950).
118. Nardone v. United States, 308 U.S. 338, 339 (1939).
119. *See* Granspan & White, *Standing to Object to Search and Seizure,* 118 U. PA. L. REV. 333, 351-52, 364 (1970).
120. *See* note 18 *supra.*
121. *See, e.g.,* S. DASH, R. KNOWLETON & R. SCHWARTZ, THE EAVESDROPPERS (1959).

rights, electronic surveillance may seriously impede a citizen's first amendment rights.[122] Finally, it must be remembered that the police are not deprived of the proper use of electronic eavesdropping. The Omnibus Crime Control Act specifically authorizes court-approved electronic surveillance, and such surveillance is constitutional under certain circumstances.[123]

Nevertheless, it appears that the *Egan* court has extended the exclusionary rule at a time when the continued existence of the rule itself, at least as a constitutional requirement, is being questioned by members of the Supreme Court.[124] Thus, it is conceivable that on appeal the Court may not be willing to push the rule to its logical bounds and, therefore, may well refuse to permit the use of the rule by a witness before a grand jury, especially when the witness has been given immunity.

Nicholas Scafidi

CONSTITUTIONAL LAW — CRIMINAL PROCEDURE — SEARCHES AND SEIZURES — WIRETAP OF DOMESTIC SUBVERSIVES WITHOUT WARRANT BUT AUTHORIZED BY ATTORNEY GENERAL FOR NATIONAL SECURITY REASONS HELD VIOLATIVE OF FOURTH AMENDMENT.

United States v. United States District Court for Eastern District of Michigan (6th Cir. 1971)

Defendants were indicted in the United States District Court for the Eastern District of Michigan by a federal grand jury for destruction of government property in violation of 18 U.S.C. § 1361.[1] During the course of the pretrial proceedings, defendants filed a motion for disclosure of certain electronic surveillance information. This information, gathered by government agents monitoring wiretaps, was obtained for the purpose of accumulating intelligence data deemed necessary to protect the nation

122. *See* Lopez v. United States, 373 U.S. 427, 469-70 (1963) (Brennan, J., dissenting).

123. *See* Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967).

124. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971). Although four justices in *Coolidge* expressed the opinion that *Mapp v. Ohio* should be overruled, a decision of that nature would not directly effect the instant case since *Mapp* merely extended the exclusionary rule to the states through the fourteenth amendment's due process clause. Mapp v. Ohio, 367 U.S. 643 (1961).

1. The statute makes it unlawful for anyone to wilfully injure or depredate any property of the United States. If the damage is $100 or less, the penalty is a fine of not more than $1,000, or imprisonment for one year or less, or both. If the damage exceeds $100, the maximum fine is $10,000 and the maximum imprisonment is ten years, the defendant being punishable by either fine, imprisonment, or both. 18 U.S.C. § 1361 (1970).

from the threat of domestic subversion.[2] These wiretaps had been expressly approved by the Attorney General as agent for the President, but no warrant or other judicial authorization had been obtained.[3] The district court ruled that the Government's wiretap in this case was unlawful, and therefore ordered full disclosure of the monitored conversations to the defendant whose conversations were involved.[4] The Government then petitioned the United States Court of Appeals for the Sixth Circuit for a writ of mandamus to the district court judge to vacate the disclosure order of the district court.

The court of appeals refused to issue the writ of mandamus, *holding:* (1) that the Government's wiretapping in this case was illegal, since the Executive Branch, in dealing with the threat of domestic subversion, is subject to the limitations of the fourth amendment when undertaking searches and seizures of oral communications by wire; and (2) that a defendant whose personal conversations have been illegally intercepted is entitled to full disclosure of such illegally intercepted material without requiring a judge's *in camera* inspection to determine the material's relevance. *United States v. United States District Court for Eastern District of Michigan,* 444 F.2d 651 (6th Cir.), *cert. granted,* 403 U.S. 930 (1971).

The validity of wiretapping as a tool of law enforcement has been a cause of controversy during the latter part of this century.[5] In the Supreme Court's initial encounter with the wiretapping issue, it held that since there was no physical trespass involved, wiretapping was not a search and seizure within the meaning of the fourth amendment.[6] In response to the proliferation in the use of wiretaps, by both law enforcement personnel and private persons, Congress enacted section 605 of the

2. United States v. Sinclair, 321 F. Supp. 1074, 1075–76 (E.D. Mich. 1971).

3. *Id.* at 1076. The Attorney General's affidavit filed at the evidentiary hearing did not even assert that, "at the time these wiretaps were installed, law enforcement agents had probable cause to believe that criminal activity (*e.g.*, the illegal overthrow of the Government through force or violence) was being plotted." *Id.* at 1079. Therefore, the court might assume that the Government could not have obtained a warrant even if it had sought one.

4. *Id.* at 1079–80. The purpose of this disclosure was to permit defense counsel to examine the records in order to determine whether any evidence presented by the Government at trial was tainted by its relationship to the illegal wiretaps. *See* notes 20 & 21 *infra.*

5. *See generally* Brownell, *The Public Security and Wire-Tapping,* 39 CORNELL L.Q. 195 (1954); Donnelly, *Comments and Caveats on the Wire Tapping Controversy,* 63 YALE L.J. 799 (1954); Rogers, *The Case for Wire Tapping,* 63 YALE L.J. 792 (1954); Note, *Wiretapping and Electronic Surveillance — Title III of the Crime Control Act of 1968,* 23 RUTGERS L. REV. 319 (1969).

6. Olmstead v. United States, 277 U.S. 438, 466 (1928). Defendants in this case were convicted of conspiring to unlawfully import, possess, and sell liquor on the basis of evidence obtained by federal prohibition officers through wiretaps on defendants' residential telephones. In sustaining the convictions, the Court stated that a fourth amendment search is "of material things — the person, the house, his papers or his effects," and consequently, oral conversations are not covered by the amendment's protections, even if overheard by the use of wiretaps, so long as there is no physical trespass involved. *Id.* at 464, 466. In a vigorous dissent, Mr. Justice Brandeis condemned wiretapping as such an inherently oppressive practice, that "espionage, writs of assistance and general warrants are but puny instruments of tyranny" in comparison with the tapping of a telephone. *Id.* at 476.

Federal Communications Act of 1934,[7] making unlawful the interception and divulgence or publication of any communication by anyone not authorized by the sender.[8] Subsequent to this enactment, the Supreme Court, in a series of cases, held that the statute prohibited: (1) the use in *federal* courts of wiretap evidence which had been obtained by *federal* agents;[9] (2) the use in *federal* courts of wiretap evidence which had been obtained by *state* law enforcement officers;[10] and (3) the use in *state* courts of wiretap evidence which had been obtained by *state* law enforcement officers.[11] Hence, there had existed, prior to the passage of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, an absolute ban on the use of wiretap evidence[12] in any state or federal prosecution.

With the supersession of section 605 by Title III,[13] the general ban on wiretapping was removed, and the constitutional standards for all

7. Act of June 19, 1934, ch. 652, § 605, 48 Stat. 1103, *as amended,* 47 U.S.C. § 605 (1970).

8. Prior to its supersession by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, (*see* note 13 *infra*), section 605 provided in pertinent part:

> No person not being authorized by the sender shall intercept any . . . communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . . No person having received [such] communication . . . shall divulge or publish the existence . . . or any part thereof or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto . . . .

Act of June 19, 1934, ch. 652, § 605, 48 Stat. 1103, *as amended,* 47 U.S.C. § 605 (1970).

9. Nardone v. United States, 302 U.S. 379 (1937). The Court in *Nardone* found that the phrase "no person" in section 605 included federal law enforcement officers. *Id.* at 381. The Court also stated that "divulgence" included use of wiretap evidence at trial. *Id.* at 382.

10. Benanti v. United States, 355 U.S. 96 (1957). In *Benanti,* wiretapping by state law enforcement officers was held violative of section 605 and hence, evidence so obtained was inadmissible in the federal prosecution, despite the absence of collusion between federal and state authorities. *Id.* at 100.

11. Lee v. Florida, 392 U.S. 378 (1968). *Lee,* in applying the exclusionary rule to state prosecutions, distinguished Rathbun v. United States, 355 U.S. 107 (1957), and overruled Schwartz v. Texas, 344 U.S. 199 (1952). 392 U.S. at 381, 383–85. In *Rathbun,* admissibility was sustained on the basis of "consent" by one party to the telephone conversation permitting law enforcement officers to listen by use of an extension phone. The non-consenting party was held to have assumed the risk of such an event, and hence, there was no *interception* within the meaning of section 605. 355 U.S. at 111. In *Lee,* police had connected a phone to defendant's party line and had set up a device to record all of the defendant's phone conversations. 392 U.S. at 379. Hence, the critical element of consent, present in *Rathbun,* was absent and despite the lack of an actual wiretap, the police action was held to violate section 605. *Id.* at 381–82. In view of the extension of the exclusionary rule's application to the states in Mapp v. Ohio, 367 U.S. 643 (1961), which overruled Wolf v. Colorado, 338 U.S. 25 (1949), the foundation for *Schwartz,* namely *Wolf,* had clearly been eroded. 392 U.S. at 385.

12. Evidence obtained by a wiretap should be distinguished from that obtained by other electronic surveillance techniques. Wiretapping generally involves an actual physical entry into telephone or telegraph circuits, whereas electronic "bugging" can be effective without necessitating such entry. Section 605 of the Federal Communications Act outlawed wiretapping, but did not apply to the more sophisticated surveillance method of "bugging." The latter's use was limited only by the fourth amendment, which, prior to *Katz,* was not considered violated unless the "bugging" involved a physical trespass into a constitutionally protected area. *See* note 16 *infra.*

13. 18 U.S.C. §§ 2510 to 2520 (1970). Although the statute generally bans interception and use of wire or oral communications, (18 U.S.C. § 2511(1) (1970)), eavesdropping (including wiretapping) is authorized in the investigation of certain enumerated crimes, provided application for such eavesdropping is made by the Attorney General or his designate to a federal judge and is approved by the same in accordance with section 2518. 18 U.S.C. § 2516(1) (1970).

electronic surveillance became applicable to wiretapping as well.[14] These standards were set forth in *Berger v. New York*[15] and *Katz v. United States*.[16] *Berger* set forth the standards for an eavesdropping warrant by pointing out what constitutional defects were present in a state statute permitting eavesdropping.[17] *Katz* determined when such warrants are necessary, holding that a warrantless search is illegal when the party against whom the eavesdropping is directed justifiably expects that his conversations are not being overheard.[18] Subsequent to these decisions, the Court in *Alderman v. United States*[19] imposed the requirement of full disclosure of the records of all illegally intercepted conversations.[20] The full disclosure requirement of *Alderman* facilitated a defendant's search for a causal relationship between the illegal evidence, which is per se inadmissible, and the otherwise legal evidence which the prosecution has chosen to use at trial.[21]

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14. The Senate Report on Title III indicates that the statute's standards are "intended to reflect existing law" and makes specific reference to *Katz*. S. REP. No. 1097, 90th Cong., 2d Sess. 66 (1968). *See* note 16 *infra*.

15. 388 U.S. 41 (1967). In *Berger*, the Court struck down as contrary to the fourth amendment a New York statute which established a warrant procedure for eavesdropping. The statute was found defective for six reasons: (1) it did not require probable cause that a particular offense had been or was being committed; (2) it did not require particular description of the conversations sought; (3) its authorization of eavesdropping for a two-month period with extensions was deemed too broad an authorization; (4) it placed no termination date on the eavesdrop once the conversation sought had been obtained; (5) there was neither a notice requirement nor a requirement of exigent circumstances in the absence of the former; and (6) it did not require a return on the warrant. 388 U.S. at 58–60.

16. 389 U.S. 347 (1967). *Katz* set forth a standard for determining when a search warrant is required for eavesdropping. In overruling the trespass doctrine of *Olmstead*, (*see* note 6 *supra*), *Katz* emphasized that the fourth amendment was intended to protect people, not places. *Id.* at 351–53. Government agents in *Katz* had "bugged" a public telephone booth by placing a microphonic device on the outside of the booth. Thus, there had been no physical entrance into the booth itself. *Id.* at 348–49. In enunciating the new standard of a justifiable expectation of privacy, the Court stated:

> [A] person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely *entitled to assume* that the words he utters into the mouthpiece will not be broadcast to the world.

Id. at 352 (emphasis added).

17. *See* note 15 *supra*.

18. *See* note 16 *supra*.

19. 394 U.S. 165 (1969).

20. *Id.* at 182. In *Alderman*, the Government conceded the illegality of the surveillance in question, but insisted that it need only turn over those logs which were "arguably relevant" to defendant's convictions. *Id.* at 181. It further contended that the determination of relevance should be made by the trial judge *in camera*. *Id.* at 181. The Court, however, concluded that the *in camera* requirement would impose too great a burden on the trial judge and that the defendant, with his counsel, is in a better position to discover the "taint." *See* note 21 *infra*. The Court stated that "the task is too complex, and the margin for error too great, to rely wholly on the *in camera* judgment of the trial court to identify those records which might have contributed to the Government's case." *Id.* at 182 (citations omitted).

21. If the police have obtained evidence illegally which leads them to sources of otherwise legal evidence, the latter will also be excluded under the "fruit of the poisonous tree" doctrine, unless the police can demonstrate: (1) that they also obtained the latter evidence through an "independent source," Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920); or (2) that the "taint" of the illegal evidence has been sufficiently dissipated; *i.e.*, that by the time the latter evidence is obtained,

Notwithstanding the requirements of *Berger, Katz* and *Alderman,* certain judicially-created exceptions to the warrant requirement have developed through the years.[22] However, the "national security" exception, the pivotal issue in the instant case, lacks the judicial recognition which these other exceptions enjoy.[23] The basis for this exception is primarily historical and political, rather than judicial. Its development is largely attributable to the policy which the Department of Justice established under section 605 of the Federal Communications Act.[24]

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the initial illegal action is so attenuated from the present discovery that it can no longer be considered the proximate cause of the latter source of evidence uncovered by the police. Nardone v. United States, 308 U.S. 338, 341 (1939).

22. Generally, these exceptions include: (1) a search made with probable cause where the exigencies of the situation make the obtaining of a warrant impractical; (2) a search made in "hot pursuit" of a fleeing suspect of a crime; and (3) a search of the person and the immediate area around him incident to his arrest. *See, e.g.,* Brinegar v. United States, 338 U.S. 160 (1949) (search of car stopped on the highway); Warden v. Hayden, 387 U.S. 294 (1967) (pursued suspect was armed); and Chimel v. California, 395 U.S. 752 (1969) (search of entire home was too inclusive), respectively. Despite the significance of these exceptions in the general area of searches and seizures, they are not especially relevant to the instant case.

23. The Supreme Court has not yet ruled explicitly on the validity of this exception, although several opinions in the *Katz* case dealt briefly with the subject. Justice Stewart, writing for the majority in *Katz,* expressed some hesitancy in extending the *Katz* standards to national security cases:

> Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.

389 U.S. at 358 n.23. Justice White, concurring, expressed the view that the decision clearly did not and should not reach national security matters:

> We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.

Id. at 364. However, in a separate concurring opinion, Justice Douglas took specific issue with Justice White's comment. Mr. Justice Douglas found it highly inappropriate for "properly interested parties," such as the President and Attorney General, to substitute their judgment for that of a neutral magistrate. *Id.* at 359-60.

24. Since section 605 prohibited interception *and* divulgence of intercepted information, (*see* note 8 *supra*), successive Attorneys General interpreted the statute to permit wiretaps, so long as no divulgence ensued. Brownell, *supra* note 5, at 197. In a confidential memorandum to Attorney General Jackson in 1940, President Roosevelt explicitly authorized the use of "listening devices directed to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies." Confidential Memorandum for the Attorney General, from President Franklin D. Roosevelt to Attorney General Jackson, May 21, 1940, *reproduced at* 444 F.2d at 670 (Appendix A). In his authorization, however, President Roosevelt requested that these investigations be minimized and that they be limited as much as possible to aliens. *Id.* A similar authorization was given to Attorney General Clark by President Truman, shortly after he entered office, which varied from the Roosevelt memorandum in that the limitations (to minimize the frequency and to confine to aliens, if possible) were excluded. Letter from Attorney General Tom C. Clark to President Harry S. Truman, July 17, 1946, *reproduced at* 444 F.2d at 670 (Appendix A). President Truman was requested in this letter to authorize the Attorney General to continue the policy presented in President Roosevelt's memorandum. However, in quoting part of the 1940 memorandum, Attorney General Clark omitted the sentence requesting limitation to aliens. President Truman endorsed the latter at the bottom, thus granting the requested authorization. In his letter to the President, the Attorney General stated:

> While I am reluctant to suggest any use whatever of these special investigative measures in domestic cases, it seems to me imperative to use them in *cases vitally affecting the domestic security,* or where human life is in jeopardy.

Id. (emphasis added). Hence, the policy under President Truman was broader than that under President Roosevelt in that it appeared to extend to domestic subversives

By the time Title III of the Omnibus Crime Control and Safe Streets Act of 1968 was being considered by Congress, the historical basis for the "national security" exception was well established. Title III removed the absolute ban on wiretapping which had existed under section 605 of the Federal Communications Act, and outlined procedures to be used by law enforcement officers in the use of all types of electronic surveillance.[25] More significant, however, is section 2511(3) of Title III, which purports to grant a national security exception to the warrant requirement. This section provides, *inter alia,* that nothing in Title III or in section 605 of the Federal Communications Act of 1934 shall limit the President in dealing with threats from foreign powers, in obtaining foreign intelligence information, or in protecting the nation from "any clear and present danger to the structure or existence of the Government."[26] It is not clear from the statute's language whether Congress intended to *grant* presidential power, or whether it merely intended *not to limit* such power.[27] It is also unclear what actions constitute a "clear and present danger to the structure or existence of the Government."

The issue raised by section 2511(3) regarding the scope of the "national security" exception had not been reached at the appellate level prior to the instant case.[28] Of equal significance is the fact that the

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as well as to foreign spies. In a memorandum filed by the Government in Black v. United States, 384 U.S. 983 (1966), Solicitor General (now Justice) Marshall stated that the Truman policy had been perpetuated throughout subsequent administrations. Supplemental Memorandum for the United States at 3–4, Black v. United States, 384 U.S. 983 (1966). However, in 1965, this policy was modified when President Johnson set forth the following guidelines:

(1) No federal personnel is to intercept telephone conversations within the United States by any mechanical or electronic device, without the consent of one of the parties involved (except in connection with investigations related to the national security).
(2) No interception shall be undertaken or continued without first obtaining the approval of the Attorney General.
(3) All federal agencies shall immediately conform their practices and procedures to the provisions of this order.

Memorandum for the Heads of Executive Departments and Agencies, from President Lyndon B. Johnson, June 30, 1965, *reproduced at* 444 F.2d at 671 (Appendix A).

25. *See* note 13 *supra.* The statute also provides for judicial approval after the interception has begun in "emergency situations," provided an application for an order approving the eavesdrop is made within forty-eight hours after the interception commences. 18 U.S.C. § 2518(7) (1970).

26. 18 U.S.C. § 2511(3) (1970).

27. Note, *supra* note 5, at 336.

28. Several lower court decisions have sustained the "national security" exception in dealing with activities of a foreign power. *See, e.g.,* United States v. Butenko, 318 F. Supp. 66 (D.N.J. 1970); United States v. Brown, 317 F. Supp. 531 (E.D. La. 1970). In *Butenko,* the district court, in affirming defendants' convictions for conspiring to transmit national defense information to the Soviet Union, ruled that the wiretaps employed by the Government for the sole purpose of gathering foreign intelligence information were not in violation of section 605 of the Federal Communications Act, and hence, the logs of such wiretaps were not discoverable by the defendants. 318 F. Supp. at 74. Similarly, in *Brown,* the court held wiretaps employed for the purpose of gathering foreign intelligence information lawful and therefore not subject to disclosure. 317 F. Supp. at 537. In its opinion, the court concluded:

> [I]f the President of the United States or his chief legal officer, the Attorney General, have considered the requirements of national security and authorized

constitutionality of the "national security" exception itself in the area of electronic eavesdropping (including both "bugging" and "wiretapping") has not yet been tested in the Supreme Court.[29]

In the instant case, the Court of Appeals for the Sixth Circuit had to determine: (1) whether the court had jurisdiction to hear the case; (2) whether the Government's wiretap was illegal; and (3) whether the defendant was entitled to any or all of the Government's surveillance records obtained by the wiretap.[30]

Prior to its treatment of the paramount issues of legality and disclosure, the court considered the jurisdictional challenge asserted by the respondent. The respondent argued that mandamus was not an appropriate procedure for review in this case because the district court's order was not appealable under 28 U.S.C. § 1291,[31] 28 U.S.C. § 1292,[32] or 18 U.S.C. § 3731.[33] The court acknowledged the general rule that mandamus may not be substituted for appeal.[34] However, the court accepted the position that the All Writs Statute[35] was a valid basis for the court's review, since this was an "extraordinary case," and, as such, was reviewable under the doctrine set forth in *Black v. Boyd*.[36] The court based its decision on the fact that this was clearly an extraordinary case, not only because of the consequences of what denial of jurisdiction would mean to peti-

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electronic surveillance as reasonable, the judiciary should not question the decision of the executive department.

Id. at 536. In addition to the district court in the present case, (*see* notes 2–4 *supra*), at least one other district court expressly held that no "national security" exception exists in dealing with domestic subversion. *See* United States v. Smith, 321 F. Supp. 424 (C.D. Calif. 1971). In *Smith*, the court ordered the Government to disclose its surveillance records to the defendant since the electronic surveillance involved was held to be constitutionally impermissible. *Id.* at 429. The court condemned the Government's treatment of dissident domestic organizations as if they were unfriendly foreign powers, and found itself "forced to conclude that in wholly domestic situations there is no 'national security' exemption from the warrant requirement of the Fourth Amendment." *Id.* The court noted that the issue of a "national security" exception in the domestic area had been decided in favor of the Government in two unreported district court cases. 444 F.2d at 656 n.2.

29. United States v. Sinclair, 321 F. Supp. 1074, 1076 (E.D. Mich. 1971).

30. 444 F.2d at 655, 656–67, 668.

31. This section grants power to the courts of appeals to review only final orders of the district courts. 28 U.S.C. § 1291 (1970). The disclosure order in the present case was an interlocutory, not a final order.

32. Section 1292 authorizes appellate power in certain limited classes of interlocutory orders (those dealing with injunctions, receiverships, admiralty and patent infringement), but does not deal with the type of situation before the court in this case. 28 U.S.C. § 1292 (1970).

33. Section 3731 authorizes appeals by the United States in criminal cases from orders dismissing an indictment, suppressing evidence or ordering the return of seized property. 18 U.S.C. § 3731 (1970). There is no reference to disclosure orders.

34. 444 F.2d at 655.

35. 28 U.S.C. § 1651 (1970). This section provides:

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

36. 248 F.2d 156 (6th Cir. 1957). In *Black*, the court noted that:

[I]t is well settled that although sparingly used, the power to issue a writ of mandamus exists and will be exercised by the court when in its discretion the exceptional circumstances of the case require its use.

Id. at 159–60.

tioner,[37] but also because the issue presented was one of first impression at the appellate level.[38] Hence, the court's exercise of jurisdiction was well founded in both precedent and reason.[39]

In approaching the principal issue of the legality of the wiretap involved, the court initially reviewed the history of fourth amendment protection[40] in the area of electronic surveillance. In so doing, the court placed special emphasis on *Katz*' general requirement of judicial authorization for all searches and seizures.[41] The petitioner's position, however, was that in national security cases the President, in his capacity as Chief Executive, has unique powers as a sovereign which exempt him and his agents from the judicial review requirement of the fourth amendment under *Katz*.[42] Consequently, the court focused its attention on the Government's presidential power argument.

The Government asserted that the President, as Commander–in–Chief and as Chief Executive, has the inherent power to safeguard the security of the nation, which includes the power to authorize wiretaps in cases involving national security.[43] In response to this assertion, the court

37. The court noted that if the district court's disclosure order were permitted to stand, the Government might be forced to dismiss its prosecution for security reasons. Hence, an order with such potential repercussions, although interlocutory, required reviewability. 444 F.2d at 655.

38. *Id.* at 656, *relying on* Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964).

39. In addition to the *Black* case cited by the court, (*see* note 36 *supra*), the court found support in Will v. United States, 389 U.S. 90 (1967). In *Will*, the Court vacated a writ of mandamus issued by the Court of Appeals for the Seventh Circuit which had directed the vacating of a pretrial order of the district court. In so doing, however, the Court noted that "exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." *Id.* at 95. It is submitted that the Government's contention in the present case — that the respondent's order was illegal — established an *allegation* of exceptional circumstances. The Government, however, had to prove the illegality of the order to justify the issuance of the writ. In order for the Government to have an opportunity to present its case, and in order for the determination of the order's legality to occur, the instant court was required to accept jurisdiction.

40. 444 F.2d at 656–60.

41. *Id.* at 657. The court quoted language from *Katz* indicating that searches without judicial authorization were unreasonable per se with a few exceptions; a search made in "hot pursuit," a search incident to an arrest and a search made with a suspect's consent. In the same quote, the *Katz* Court noted that none of these exceptions would apply to an electronic eavesdropping situation. 389 U.S. at 357–58. In a recent case, however, the "consent" exception has been made applicable to certain electronic surveillance situations. United States v. White, 401 U.S. 745 (1971), *noted in* 17 VILL. L. REV. 350 (1971). The *White* Court held that whenever one speaks face–to–face to another, the former takes the risk that the latter may relate or transmit such conversations to government agents. *Id.* at 752. This assumption of risk can be construed as "constructive consent;" however, the Court rendered its decision in terms of the defendant's lack of "justifiable expectation of privacy." *Id.*

42. 444 F.2d at 657.

43. The court's opinion quoted the following sections from the petitioner's primary and supplemental briefs:

> The President, in his dual role as Commander–in–Chief of the armed forces and Chief Executive, possesses another serious power and responsibility — that of safeguarding the security of the nation against those who would subvert the Government by unlawful means.
>
> *This power is the historical power of the sovereign to preserve itself.* The power at issue in this case is the inherent power of the President to safeguard the security of the nation.

Id. at 658 (emphasis added). This position, as the court recognized, suggests neither a limitation on such presidential power nor a recognition that the sovereign power of

examined the Constitution as it relates to the President's power,[44] and noted that "[n]o *express* grant of power to the President to make searches and seizures without regard to the fourth amendment may be found in these constitutional provisions."[45] It then examined the cases cited by the petitioner to support the proposition that the President had such implied power, and found them all distinguishable on their facts.[46] These cases dealt with the war and foreign relations powers of the President[47] and with the power of the judiciary where the executive acts in domestic affairs.[48] The court instead looked to the case of *Youngstown Sheet &*

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the United States is distributed among the three branches of Government by the Constitution. *Id.*

44. The Constitution of the United States delineates the principal powers of the President as follows:

> The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the Same Term, be elected, as follows . . . .

U.S. CONST. art. II, § 1.

> The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.
>
> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2.

> [He] shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

U.S. CONST. art. II, § 3.

45. 444 F.2d at 658 (emphasis added).

46. The petitioner cited the following cases: Cafeteria & Restaurant Workers Local 473 v. McElroy, 367 U.S. 886 (1961); Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948); United States v. Pink, 315 U.S. 203 (1942); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); Oetjen v. Central Leather Co., 246 U.S. 297 (1918); and Totten v. United States, 92 U.S. 105 (1875). As accurately noted by the court, none of these cases were criminal cases, and none dealt with a domestic security problem. 444 F.2d at 659.

47. The distinguishability of these cases could hardly be deemed surprising. Since the issue in this case was one of first impression, it follows that there could not exist a prior appellate case precisely on point.

48. The Government cited *In re* Debs, 158 U.S. 564 (1895); and Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). *Debs* dealt with contempt sentences for violating an injunction, subsequent to which petitioner had sought a writ of habeas corpus, which the Court denied on the basis of valid jurisdiction by the court which had issued the injunction. 158 U.S. at 592. The court in the instant case accurately noted that *Debs* could not be considered authority for "ignoring judicial processes." 444 F.2d at 659. *Marbury*, the court noted, was also non-supporting in that its thrust was to establish the doctrine of judicial review of acts of Congress and to affirm the supremacy of the Constitution over all three branches of Government. Clearly, it did not deal with domestic subversion, nor did it deal with the fourth amendment. Further, it is submitted that any analogy between President Jefferson's refusal to deliver a judicial commission in *Marbury* and President Nixon's authorization (per the Attorney General) of wiretaps in the instant case is strained both in logic and in temporal setting.

Tube Co. v. Sawyer[49] as its authority for limiting presidential power in the domestic area. In *Youngstown,* President Truman's seizure of the steel mills to avert a nationwide steel strike was held improper by the Supreme Court on the basis that presidential powers did not include any implied power to take private property for public use without congressional authorization as required by the fifth amendment.[50] The instant court recognized that *Youngstown* was not a wiretap case but maintained that it was "the authoritative case dealing with the inherent powers of the Presidency . . . ."[51]

The validity of *Youngstown* as authority in the present case was contingent on the court's subsequent determination that there had been no congressional authorization for the Government's actions as is required to safeguard fourth amendment rights.[52] The critical fact in *Youngstown* was the lack of congressional authorization of the President's order either before or after the fact.[53] Indeed, the Court stated that "[t]he power of Congress to adopt such public policies as those proclaimed by the order is beyond question."[54] *Youngstown* established a limitation on the actions of the President acting alone, and did not purport to limit executive activity pursuant to legislative mandate. It was thus necessary for the court to determine whether the President had received congressional authorization in this particular case.

After outlining judicial approaches to the wiretapping problem, the court reviewed the history of congressional action in that area. Initially, section 605 of the Federal Communications Act of 1934[55] was examined. The court acknowledged the Justice Department policy under section 605 of tapping without divulging,[56] and then examined Title III of the Omnibus Crime Control and Safe Streets Act of 1968[57] to determine its impact on both section 605 and that policy.

In its interpretation of the statute, the court first noted the existence of a remedy to the Government's dilemma in this type of case in the "emergency situation" provision of Title III.[58] However, since the

49. 343 U.S. 579 (1952). In *Youngstown,* President Truman had directed the Secretary of Commerce to seize the steel mills in order to avert a national steel strike, which the President thought would jeopardize national defense. Congress had not authorized this action either before or after the seizure occurred. The Court held the order invalid, finding no authority for the action by the President either as Commander-in-Chief or as Chief Executive. *Id.* at 587–89.

50. *Id.*

51. 444 F.2d at 661.

52. *See* notes 59–62 and accompanying text *infra.*

53. *See* note 49 *supra.*

54. 343 U.S. at 588.

55. *See* note 8 *supra.*

56. 444 F.2d at 662. For a discussion of this policy, *see* note 24 *supra.*

57. *See* notes 25 & 26 and accompanying text *supra.*

58. 444 F.2d at 664. The "emergency situation" provision is summarized in note 25 *supra.* It is submitted that the remedy provided in this section might not be considered adequate by the Government, since the danger of a "security leak" might still be present if the Government were required to submit an application to a judicial officer within forty-eight hours after the interception commences. The fact that Congress provided special procedures in cases of national security supports, however, the argument that Congress did not intend to exempt such a situation entirely. *See* Com-

petitioner had failed to utilize this provision in the instant case, the court turned to section 2511(3),[59] upon which the Government relied. The broad language of this section could be read to support an interpretation that the President may authorize electronic surveillance in dealing with both foreign espionage and domestic subversion. However, the legislative history seems to indicate a narrower view of "national security."[60] Nevertheless, it is submitted that the language of the statute, reserving presidential power to take necessary measures "against any other clear and present danger to the *structure* or existence of the Government,"[61] is sufficiently clear on its face that an examination of legislative intent might be deemed unwarranted.[62] However, the court adopted the narrower interpretation that this section[63] was not indicative of a *grant* of power, but was intended to place Congress in a neutral position with respect to the type of controversy involved in this case.[64]

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ment, *Privacy and Political Freedom: Application of the Fourth Amendment to "National Security" Investigations,* 17 U.C.L.A.L. REV. 1205 (1970). There, the author summarized and refuted the government's arguments for the "national security" exception. One such argument was that it would not be feasible for the Government to bring to a court's attention all the factual and policy considerations upon which a decision to employ electronic surveillance should be based. This assertion of "lack of feasibility" is possibly due to the Justice Department's distrust for the courts and to the need for maintaining secrecy on certain matters. *Id.* at 1241–42. The court noted, however, that the Attorney General could deal with untrustworthy members of the judiciary. 444 F.2d at 666.

59. For the text of this section, *see* note 26 *supra.*

60. The Senate Report on Title III states in part:

> It is obvious that whatever means are necessary should and must be taken to protect the national security interest. Wiretapping and electronic surveillance techniques are proper means for the acquisition of counter-intelligence against the hostile action of foreign powers. Nothing in the proposed legislation seeks to disturb the power of the President to act in this area. Limitations that may be deemed proper in the field of domestic affairs of a nation become artificial when international relations *and internal security* are at stake.

S. REP. No. 1097, 90th Cong., 2d Sess. 69 (1968) (emphasis added). It is unclear from this statement whether Congress intended to include domestic subversion as a national security threat. The context in which the terms "domestic affairs" and "internal security" are used seems to imply a distinction between them. Later in the Senate Report, the writers seem to assume that the national security provision (section 2511(3)) applies only to actions undertaken on behalf of foreign powers, although there is a possible overlap into the domestic area in that Communist party "front" organizations are considered instruments of a foreign power:

> Where foreign affairs and internal security are involved, the proposed system of court ordered electronic surveillance envisioned for the administration of domestic criminal legislation is not intended necessarily to be applicable. The two areas may, however, overlap. Even though their activities take place within the United States, the domestic Communist party and its front group remain instruments of the foreign policy of a foreign power. . . . Consequently, they fall within the field of foreign affairs and outside the scope of the proposed chapter. Yet, their activities may involve violations of domestic criminal legislation.

Id. at 94. It is submitted that this statement of legislative intent, while clarifying the domestic–foreign dichotomy to some extent, raises another problem, namely, a need for standards to help in classifying groups as Communist party "front groups."

61. 18 U.S.C. § 2511(3) (1970) (emphasis added).

62. Even if the statute is interpreted this broadly, the constitutional questions regarding such presidential power remain unanswered.

63. "Nor shall anything contained in this chapter be deemed to *limit* the constitutional power of the President . . . ." 18 U.S.C. § 2511(3) (1970) (emphasis added).

64. 444 F.2d at 664. By so construing the statutory language, the court avoided confrontation with the potential issue of the constitutionality of section 2511(3). Had the court interpreted this section as authorizing the Government's action in this case,

The court concluded that the President and his agents were subject to the limitations of the fourth amendment in dealing with the threat of domestic subversion.[65] Judgment was expressly reserved, however, with respect to warrantless wiretapping which is directed against espionage or sabotage by agents of a *foreign* power.[66] In rendering its decision, the court emphasized the basic historical and constitutional relationship between the fourth amendment protection against unreasonable searches and seizures and the first amendment freedoms of speech and press. Noting the danger of abuse if unrestricted wiretapping power were placed in the Executive Branch, and noting the purpose of the constitutional doctrine of separation of powers to restrict such power, the court stated:

> The argument for unrestricted employment of Presidential power to wiretap is basically an argument *in terrorem.* It suggests that constitutional government is too weak to survive in a difficult world and urges worried judges and worried citizens to return to the security of "sovereign" power. We are earnestly urged to believe that the awesome power sought for the Attorney General will always be used with discretion.[67]

The court characterized the fourth amendment's role in this contest as that of "guardian of the First [Amendment]."[68]

The court's observation was particularly relevant in the present case. The nexus between these two amendments is especially close in the area of electronic surveillance. Such surveillance, since it is virtually undetectable, may have a "chilling effect" upon both uninhibited expression of ideas and free association.[69] The fear of exposing oneself to electronic surveillance could have a significant impact on the membership and vitality of dissident groups. Injunctive relief may be available to individuals or groups against whom eavesdrops are indiscriminately em-

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it would have been compelled either to rule section 2511(3) unconstitutional or to abandon the constitutional rationale it adopted.

65. 444 F.2d at 667.

66. *Id.* The court also declined to decide the question whether the Government in the instant case had probable cause to obtain a warrant if one had been sought. *See* note 3 *supra.*

67. *Id.* at 665–66. Petitioner had cited articles by Attorney General Rogers and Assistant Attorney General Brownell which had presented the argument that despite the "dirty business" inherent in wiretapping, it is no worse than other permissible means of eavesdropping, and it is vitally necessary as a measure of self-protection in view of the widespread infiltration of Communists into the Government. Brownell, *supra* note 5, at 201–05; Rogers, *supra* note 5, at 794–95. It is submitted that these articles are the product of the "McCarthy era" of the early 1950's, and, as such, reflect the paranoia inherent in the term "monolithic communism," a doctrine of dubious viability for the 1970s in light of present political realities.

68. *Id.* at 666.

69. *See* Owen, *Eavesdropping at the Government's Discretion — First Amendment Implications of the National Security Eavesdropping Power,* 56 CORNELL L. REV. 161 (1970). In this article, the author outlines the dangers inherent in "national security" wiretaps without judicial supervision. He specifically notes the danger of abuse in utilizing wiretaps against those individuals and groups which espouse an unpopular ideology, and describes the impact of such potential abuse on freedom of association. *Id.* at 163–64. *See also* Comment, *supra* note 58, at 1205.

ployed.[70] However, if the Attorney General's authorization is deemed sufficient in itself to render the eavesdrop justified, the equitable remedy of injunction would be virtually unavailable.

That a potentially greater danger of suppression of these freedoms is posed by "domestic subversion" wiretaps than by "foreign espionage" wiretaps further supports the court's distinction between the two categories.[71] Although that distinction is susceptible to criticism,[72] there is significant authority for its support from several commentators[73] and from the American Bar Association as well.[74] Further support for the distinction is provided by Justice Fortas' definition of "national security" in *Alderman:*

> By the term "national security material," I mean to refer to a rigid and limited category. It would not include material relating to any activities except those specifically directed to acts of sabotage, espionage, or aggression by or on behalf of foreign states.[75]

Although the Sixth Circuit was a pioneer among the appellate courts in articulating the domestic–foreign distinction in the instant case, it is clear that the idea had been entertained by others prior to this decision.

In treating the final issue of disclosure, the court relied on the *Alderman* decision.[76] The *Alderman* Court held that once an eavesdrop is determined to have been illegal, the defendant whose conversations were involved is entitled to full disclosure of all such illegally intercepted conversations.[77] In the present case, the Government contended that

70. *See* Owen, *supra* note 69, at 170. The author refers to *Dombrowski,* where a civil rights group was being harassed by state investigations and prosecutions. The Court held that the group was entitled to seek injunctive relief rather than await the outcome of prosecutions. Dombrowski v. Pfister, 380 U.S. 479 (1965). The author asserts that the holding of *Dombrowski* could be extended to groups seeking injunctive relief, where they can show: (1) reasons for their fear of eavesdropping; (2) the "chilling effect" on the first amendment freedoms produced by such fear; and (3) the lack of any alternative means of relief. However, where groups fear eavesdropping but cannot substantiate their fears, the injunctive remedy would appear to be unavailable.

71. At the outset, when one is dealing with foreign espionage, many of those involved are likely to be aliens, not United States citizens, and hence, subject to deportation procedures as an alternative to criminal prosecution. *See generally* 8 U.S.C. § 1252 (1970). More important, however, is the danger of uncontrolled, subjective judgment in determining what individuals and groups should be classified as "domestic subversives."

72. Judge Weick, dissenting in the instant case, rejected the distinction since the threat to the structure of the Government posed by domestic subversion is, in his view, just as great as that posed by foreign espionage. 444 F.2d at 676.

73. *See* Theoharis & Meyer, *The "National Security" Justification for Electronic Eavesdropping: An Elusive Exception,* 14 WAYNE L. REV. 749, 753 (1968); Note, *supra* note 5, at 349.

74. AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE § 3.1 (1971). Section 3.1 permits electronic surveillance under "Presidential and Congressional standards and supervision" to deal with the military and espionage activities of foreign powers, but is silent (as are the other sections) on the threat of domestic subversion.

75. 394 U.S. at 209.

76. *See* note 20 *supra.*

77. 394 U.S. at 182–83.

Taglianetti v. United States[78] required an *in camera* inspection of surveillance records for a determination of their relevance, and that only relevant material need be disclosed. However, the court had no difficulty distinguishing *Taglianetti* from the instant case,[79] since the primary issue in the former involved standing,[80] while in the latter the Government conceded that the defendant's own voice was involved.[81] The Government also relied on Justice Stewart's concurring opinion in *Giordano v. United States*[82] as authority for requiring an *in camera* determination of the relevance of wiretap records. The court distinguished *Giordano* also, noting that:

> The full text of Justice Stewart's opinion makes it clear that the "preliminary determination" with which he was concerned was whether or not "any of the surveillances *did* violate the Fourth Amendment." This determination Justice Stewart held could be made by *in camera* inspection — as has been done in this case both by the District Judge and this court.[83]

Concluding that *Alderman* was unimpaired by *Taglianetti* and *Giordano,* the court denied the Government's petition and affirmed the district court's disclosure order.[84]

One practical implication of this decision may be to significantly deter the Government from making warrantless wiretaps on suspected domestic subversives. Not only will the direct evidence so obtained be inadmissible in court, but the Government will additionally face the onerous choice of either turning over to the defendant all the logs containing his conversations or discontinuing the prosecution entirely.[85]

The instant holding, however, does not prevent the Government from effectively dealing with threats of domestic subversion. As was pointed

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78. 394 U.S. at 316 (1969). In *Taglianetti,* the Court denied the defendant access to the transcripts of intercepted conversations to which the defendant was not a party. *Id.* at 317.

79. 444 F.2d at 668.

80. *See* note 78 *supra.*

81. 444 F.2d at 668.

82. 394 U.S. 310 (1969). Concurring in *Giordano,* Justice Stewart stated:

> Moreover, we did not in *Alderman, Butenko,* or *Ivanov* [all decided together, 394 U.S. 165 (1969)] and we do not today, specify the procedure that the District Courts are to follow in making this preliminary determination. We have nowhere indicated that this determination cannot appropriately be made in *ex parte, in camera* proceedings . . . .

Id. at 314. The "preliminary determination" to which Justice Stewart referred, and for which the Court remanded the case, was the determination of *legality,* not *relevance.*

83. 444 F.2d at 668.

84. *Id.* at 669.

85. Although the difficult question in this case was the legality of the wiretap, it is submitted that the disclosure requirement mandated by *Alderman* provides the strongest deterrent to illegal wiretapping. While the Government may be willing to accept the inadmissibility of its wiretap evidence in court, the disclosure of its surveillance records to a suspected subversive may involve a significant security risk which the Government may be unwilling to take. Even if the Government does not offer wiretap records as evidence, it may be subject to a disclosure order if the defendant discovers that he has been the subject of electronic surveillance and subsequently requests disclosure at an evidentiary hearing, provided the eavesdrop is rendered illegal.

out in the opinion, the fourth amendment does not prohibit the President or other officials from defending the existence of the state; it merely prescribes what methods must be followed.[86] One permissible course for the Government to follow is to comply with the warrant procedures outlined in Title III of the Omnibus Crime Control and Safe Streets Act.[87] These provisions appear to provide adequate means for dealing with the type of situation faced in the present case.[88] Should the Government disagree with this conclusion, however, it may seek to establish a connection between apparent domestic dissident groups and foreign governments in order to invoke the "foreign espionage" national security exemption from judicial supervision.[89] This is a problem with which the instant case did not deal. However, if the present decision is upheld,[90] it is likely that this problem will arise in the future. Nevertheless, the court's recognition of a qualitative difference between the ramifications of permitting warrantless wiretaps against domestic vis–à–vis foreign security threats provides an excellent foundation for later judicial treatment of problems in the fourth amendment–national security area.

David L. Williams

CONSTITUTIONAL LAW — CRIMINAL PROCEDURE — SELF-INCRIMINATION — SECTION 6002 OF THE ORGANIZED CRIME CONTROL ACT OF 1970 GRANTING USE IMMUNITY TO PROSECUTION DECLARED CONSTITUTIONAL AND UNCONSTITUTIONAL IN SEPARATE CIRCUIT COURT OPINIONS.

Stewart v. United States (9th Cir. 1971)

In re Korman (7th Cir. 1971)

In separate criminal proceedings, the appellants were adjudged to be in civil contempt and ordered confined pursuant to section 301(a) of the Organized Crime Control Act of 1970.[1] Each of the appellants had refused to answer questions during federal grand jury proceedings which

86. 444 F.2d at 666.

87. *See* notes 13 & 25 *supra.*

88. When time factors make compliance with section 2516(1) impractical, the "emergency situation" provision of section 2518(7) should be adequate to fill the gap. *See* notes 13, 25 & 58 *supra.*

89. *See* note 60 *supra.* There, it is noted that the Senate Report on Title III mentioned the classification of Communist party "front groups" as activities of foreign powers.

90. The instant case has been granted certiorari by the United States Supreme Court. 403 U.S. 930 (1971).

1. 28 U.S.C. § 1826 (1970).

occurred in two separate forums — Illinois and California.[2] Despite the fact that an order had been issued commanding them to answer and granting them immunity, in any future prosecution, from the use of their testimony or any evidence obtained therefrom,[3] appellants remained steadfast in their refusal, invoking the fifth amendment privilege against self-incrimination. In both cases, appellants' continued refusal to answer questions directed to them was based on the belief that only transactional immunity[4] could adequately protect their fifth amendment privilege in light of *Counselman v. Hitchcock*.[5]

The Government in both cases urged that the statements in *Counselman* relating to absolute immunity were mere dicta, and have been either limited or overruled sub silentio by *Murphy v. Waterfront Commission of New York Harbor*.[6] The United States Court of Appeals for the

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2. *In re* Korman, 449 F.2d 32 (7th Cir.), *petition for cert. filed sub nom.* United States v. Korman, 40 U.S.L.W. 3059 (U.S. June 18, 1971) (No. 70-303); Stewart v. United States, 440 F.2d 954 (9th Cir.), *cert. granted sub nom.* Kastigar v. United States, 402 U.S. 971 (1971).

3. Such order was granted pursuant to the Organized Crime Control Act of 1970 § 201, 18 U.S.C. § 6002 (1970), which provides:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege of self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

4. Appellants asserted that the immunity provision of the Act was invalid because it afforded only a "use immunity." The phrase "use immunity" means only that the witness' testimony and other information derived therefrom may not be used against him in a subsequent prosecution. In the case of use immunity, if *independent* evidence is found of the crime which the witness has divulged, he can be prosecuted and that evidence may be used against him. Appellants urged that such a limited immunity did not adequately preserve their fifth amendment privilege against self-incrimination, and that the Constitution requires nothing less than "transactional immunity." "Transactional immunity" means that the witness may not be subsequently prosecuted for any matter divulged by his testimony concerning the transaction for which he was granted immunity. Thus, while use immunity merely precludes the *use* of the immediate testimony and its fruits, transactional immunity precludes *prosecution* and *terminates liability* for the crime itself. United States v. Cropper, ___ F.2d ___ (5th Cir. 1971).

5. 142 U.S. 547 (1892). The Court in *Counselman* stated the requirement to be:

> In view of the constitutional provision [against self-incrimination], a statutory enactment to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates.

Id. at 586.

6. 378 U.S. 52 (1964). In *Murphy*, the Court considered the question of whether one federal jurisdiction, to which testimony had been given by a witness who was granted immunity, might use that testimony to convict him of a crime against another jurisdiction. The Court held that:

> [A] state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be

Seventh Circuit reversed the lower court's contempt order, *holding* that *Counselman* remains authoritative on the issue of the minimum constitutional requirement for immunity statutes, and if the federal government seeks to compel a witness to testify, it must grant him full transactional immunity from prosecution under its laws. *In re Korman,* 449 F.2d 32 (7th Cir.), *petition for cert. filed sub nom.* United States v. Korman, 40 U.S.L.W. 3059 (U.S. June 18, 1971) (No. 70–303). The United States Court of Appeals for the Ninth Circuit took the position that the immunity statute in question adequately implements the protections of the fifth amendment as construed by *Murphy.*[7] Affirming the district court's opinion, the court *held* that the immunity granted need not bar all future prosecution for the transaction to which the witness' testimony relates, but only that the compelled testimony and its fruits cannot be used in a subsequent prosecution of the witness. *Stewart v. United States,* 440 F.2d 954 (9th Cir.), *cert. granted sub nom.* Kastigar v. United States, 402 U.S. 971 (1971).

Many would agree that the "privilege against self-incrimination is one of the great landmarks in man's struggle to make himself civilized."[8] Indeed, the historical evolution of this privilege in American law consists of various attempts to reconcile two conflicting principles — liberty and authority.[9] The first influential interpretation of the privilege, propounded by Chief Justice Marshall, gave it a broad scope:

> Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears . . . to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible but a probable case that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact itself might be unavailing, but all other facts without it would be insufficient . . . . The rule which declares that no man is compelled to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description.[10]

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used in any manner by federal officials in connection with a criminal prosecution against him.

Id. at 79.

7. *Id.*

8. E. GRISWOLD, FIFTH AMENDMENT TODAY 7 (1955). One of the major evils sought to be prevented by the privilege against self-incrimination was the use of torture or any coercion to extract a confession. Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause,* 29 MICH. L. REV. 1, 191 (1930). The importance of the privilege is evidenced by the fact that it extends to protect any witness in any type of proceeding which can legally demand testimony, when such testimony might ultimately be used against the person in a criminal prosecution. Wendel, *Compulsory Immunity Legislation and The Fifth Amendment Privilege: New Developments and Confusion,* 10 ST. LOUIS U.L.J. 327, 329 (1966).

9. The demands of governmental authority have never been more clearly stated than by Lord Chancellor Hardwicke: "The public has a right to every man's evidence." 12 CORBETT'S PARLIAMENTARY HISTORY 693 (1812).

10. United States v. Burr, 25 F. Cas. 38, 40 (No. 14,692e) (C.C.D. Va. 1807).

Because it has been so broadly interpreted,[11] the privilege can present a significant barrier to the government in its attempt to obtain information necessary for regulation.[12] For more than a century, Congress has attempted to resolve the apparent conflict between private right and governmental authority by adopting immunity legislation for witnesses giving compelled testimony.[13] Such immunity statutes are based on a literal interpretation of the fifth amendment; namely, that a person cannot be forced to give evidence which might be used to his detriment in a subsequent criminal prosecution.[14] In exchange for the right to compel this testimony, the government is barred from imposing penal sanctions upon the witness for matters relating to his testimony.[15]

The immunity concept applied in the instant cases is contained in the Organized Crime Control Act of 1970.[16] The purpose of the Act is to eradicate organized crime in the United States[17] by increasing the number of legal tools to be used in the evidence gathering process,[18] by establishing new penal prohibitions[19] and by adding enhanced sanctions and new remedies to deal with those engaged in organized crime.[20] The pertinent section of the Act has been adopted as the general immunity

11. *See* Wendel, *supra* note 8; Note, *Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568, 1569 (1963).

12. Among the many powers of the federal government is the power to compel persons to testify in court or before a grand jury. The testimony of the citizenry is one of the government's primary sources of information. The duty to testify was first recognized by the First Congress in the Judiciary Act of 1789, which contained a provision for compulsory attendance of witnesses in the federal courts. Act of Sept. 24, 1789, ch. 20, § 1, 1 Stat. 73, 88. The corresponding duty of a witness to testify is particularly important to the continued functioning of the federal government in its regulatory roles. "[W]ithout the power to compel testimony, the courts, upon whom the ultimate responsibility for an orderly society rests, would be unable to function." Lilienthal, *The Power of Governmental Agencies to Compel Testimony*, 39 HARV. L. REV. 694 (1926). *See also* Note, *supra* note 11, at 1570.

13. An immunity statute has been defined as an act which grants to a government agent "the power to compel a witness to testify about any matter, despite the self-incriminating nature of the testimony." Note, *supra* note 11, at 1570. Wigmore, in his analysis of the immunity provisions, stated four essential factors:

> [T]he state, (1) having in view that its crimes are the subject of a privilege . . . (2) calls upon an individual for a testimonial disclosure [of the crime], (3) invoking compulsion of law as a means of obtaining it and (4) granting immunity as a concomitant of the disclosure.

8 WIGMORE, EVIDENCE § 2282 (McNaughton rev. 1961). "Immunity" denotes that the witness cannot be held liable for the offense itself, while "privilege" signifies that the witness may not be compelled to speak about the offense. Thus, by immunity the offender's guilt ceases, while under the privilege, it continues. *Id.*

For a concise history of American immunity legislation, *see* Wendel, *supra* note 8, at 331. Summaries of the immunity principle may also be found in various congressional committee reports on proposed immunity legislation. *See, e.g., Hearings on S. 30 Before a Subcomm. of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970).

14. Wendel, *supra* note 8, at 327.

15. *See, e.g.*, 15 U.S.C. § 49 (1970); 18 U.S.C. § 6002 (1970); 38 Stat. 722-23 (1914).

16. 1 U.S. CODE CONG. & AD. NEWS 1073 (1970). The immunity provision is codified in 18 U.S.C. § 6002 (1970).

17. 1 U.S. CODE CONG. & AD. NEWS 1073 (1970).

18. 18 U.S.C. §§ 3503, 3504 (1970); 18 U.S.C. § 3331 (1970); 18 U.S.C. §§ 6001 *et seq.* (1970).

19. 18 U.S.C. § 1962 (1970); 18 U.S.C. § 1995 (1970).

20. 18 U.S.C. §§ 3775 to 3778 (1970).

provision on the federal level, deviating from the *Counselman* requirement of transactional immunity in that it affords the witness only a use immunity.[21]

Two conflicting considerations were primarily responsible for the contrary results reached by the Seventh and Ninth Circuits in their decisions as to the constitutionality of the immunity statute. The Seventh Circuit expressed the view that the immunity conferred must provide the witness with the same protection he would be afforded by a proper invocation of his fifth amendment privilege. Since the main thrust of this position is the protection of individual rights, it necessarily leads to the conclusion that the immunity must be transactional.[22] The Ninth Circuit concluded that while the grant of immunity should afford as nearly as possible the same protection as the fifth amendment, the grant should be as narrow and precise as possible in order to minimize any disruptive effects on law enforcement activity. In the opinion of that court, this requirement is met by providing the witness with the narrower use immunity.[23] Before looking further into the basis for these divergent decisions, it is first necessary to examine the two major cases upon which each court relied in reaching its conclusion — *Counselman*[24] and *Murphy*.[25]

In *Counselman,* the Supreme Court was confronted with the problems raised by a witness who would not testify despite a statutory grant of immunity. In that case, the witness, subpœnaed before a grand jury investigating violations of the Interstate Commerce Act of 1887,[26] refused to testify on fifth amendment grounds, and continued in his refusal after being informed of his immunity[27] and ordered to testify.[28] It was held that in order to comply with the mandates of the Constitution, an immunity statute must provide the same protection as the fifth amendment.[29] Since the witness remained subject to prosecution after he answered the incriminating questions,[30] *Counselman* deemed the protection afforded by

21. 18 U.S.C. § 6002 (1970) provides in pertinent part:
[N]o such testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) . . . may be used against the witness in any criminal case . . . .
22. 449 F.2d at 40.
23. 440 F.2d at 956.
24. Counselman v. Hitchcock, 142 U.S. 547 (1892).
25. Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).
26. 24 Stat. 379 (1887), 49 U.S.C. §§ 1 *et seq.* (1970).
27. Immunity was provided under the Act of February 25, 1868, ch. 13, 15 Stat. 37. The Government brought suit in England in an attempt to recover from English banks certain assets deposited by the dead Confederacy. An agent of the Confederate government refused to testify, claiming that to do so would result in a forfeiture of his property. The above immunity act was specifically passed to obtain his testimony.
28. 142 U.S. at 550.
29. *Id.* at 585.
30. *Id.* The Court stated:
We are clearly of [the] opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States.

the Act to be too narrow and thereby intimated that a grant of transactional immunity is constitutionally required in such statutes.

Notwithstanding this indication that transactional immunity is required, there is also languge in *Counselman* supporting the theory that use immunity, which operates to bar the use of the compelled testimony and its fruits, may indeed be constitutionally permissible. Justice Blatchford, writing for the majority, enumerated the vices in the statute then at issue as follows:

> It [the statute] could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted.[31]

However, in ruling that the immunity provision of the Act was insufficient in light of the fifth amendment privilege, the Court formulated the standard by which future federal immunity statutes would be tested:

> In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates.[32]

Thus, the seeds of discord were sown in the explicit language of the opinion; *i.e.,* statements in support of both use and transactional immunity may be found. *Counselman*'s susceptibility to two interpretations provides the first basis for the conflict inherent in the instant cases.

A second basis for the present confusion is the Court's decision in *Murphy*.[33] After having been granted immunity under New York and New Jersey laws,[34] Murphy and others claimed the privilege against self-incrimination before the Waterfront Commission of New York Harbor which was investigating work stoppages.[35] Their basic contention was that the state immunity laws were invalid since the immunity granted did not preclude federal prosecution.[36] Mr. Justice Goldberg delivered the opinion of the Court on the vital question of "whether one jurisdiction within our federal structure may compel a witness, whom it has immunized

31. *Id.* at 564.
32. *Id.* at 586. This passage has been considered the key passage in the evolution of compulsory immunity legislation since 1892. It has been historically regarded as demanding the immunization of any "transactions, matters, and things revealed in compelled testimony." Wendel, *supra* note 8, at 370.
33. Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).
34. *Id.* at 53.
35. *Id.* at 52.
36. *Id.* Prior to the *Murphy* decision, even if the United States or a state had compelled testimony through a grant of immunity under its law, a second sovereign was totally free to disregard the grant. United States v. Murdock, 284 U.S. 141 (1931). Thus, *Murphy* broadened the effect of a state's grant of transactional immunity, but simultaneously narrowed its scope by prohibiting only the use of the compelled testimony and its fruits by the non-questioning sovereign.

from prosecution under its laws, to give testimony which might then be used to convict him of a crime against another such jurisdiction."[37]

The *Murphy* Court held that once New Jersey had granted immunity to the witness, the United States could not use the compelled testimony or its fruits against him.[38] The Government did, however, remain free to prosecute based on independent evidence for a federal crime related to the transaction for which New Jersey had granted transactional immunity.[39] The Court concluded that New Jersey may require the witness to testify even though he was guaranteed, as against another sovereign, nothing more than protection against use of that testimony which New Jersey had compelled.[40] In the view of Justice Goldberg, the immunity statute which the Court had invalidated in *Counselman* was unconstitutional because, in the words of the *Counselman* Court, the statute "could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding . . . ."[41]

In an attempt to reconcile these two decisions, it can be argued that the *Murphy* decision was merely a reaffirmation of the transactional immunity requirement of *Counselman,* coupled with a supplementary ruling that another sovereign must respect so much of that grant of immunity as prohibits the use of the testimony or its fruits in a prosecution under its laws.[42] This was the reasoning employed by the Seventh Circuit in

37. 378 U.S. at 53. Malloy v. Hogan, 378 U.S. 1 (1964), extended the application of the fifth amendment privilege to the states through the due process clause of the fourteenth amendment. However, the basic issue remains the same; that is, whether the testimony is compelled by the federal government and used by a state, or compelled by a state and used by the federal government.

38. 378 U.S. at 78.

39. *Id.* at 79.

40. *Id.* Justice Goldberg, speaking for the Court, stated:

> [W]e hold the constitutional rule to be that a *state* witness may not be compelled to give testimony which may be incriminating under *federal* law unless the compelled testimony and its fruits cannot be used in any manner by *federal officials* in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the *State* and *Federal Governments* in investigating and prosecuting crime, the *Federal Government* must be prohibited from making any such use of compelled testimony and its fruits. This exclusionary rule, while permitting the *States* to secure information necessary for effective law enforcement, leaves the witness and the *Federal* Government in substantially the same position as if the witness had claimed his privilege in the absence of a *state* grant of immunity.

Id. (emphasis added). A footnote to this statement read:

> Once a defendant demonstrates that he has testified under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent legitimate source for the disputed evidence.

Id. at n.18.

41. 142 U.S. at 564, *quoted in* Murphy v. Waterfront Comm'n, 378 U.S. 52, 78 (1964).

42. *See* United States *ex rel.* Catena v. Elias, 449 F.2d 40 (3d Cir.), *petition for cert. filed,* 40 U.S.L.W. 3198 (U.S. Oct. 26, 1971) (No. 71-377). In *Catena,* the United States Court of Appeals for the Third Circuit ruled that a New Jersey statute which failed to grant transactional immunity constituted an inadequate basis for compelling an unwilling witness to testify.

In re Korman.[43] The Ninth Circuit, however, interpreted *Murphy* as indicating that a state may compel testimony concerning any violation of its criminal laws via a grant of less than transactional immunity.[44] These two interpretations of *Murphy* represent another conflict found in the instant circuit court decisions.

The Court of Appeals for the Seventh Circuit held that the statements in *Counselman* announced a constitutional doctrine to the effect that a grant of transactional immunity must be given on a single sovereign level.[45] The court reasoned that the ground for the *Counselman* holding[46] was that "no [immunity] statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him can have the effect of supplanting the privilege."[47] The *Korman* decision, however, was not based upon *Counselman* alone,[48] and reliance was also placed on *Brown v. Walker,*[49] decided four years later. In that case, the Supreme Court upheld the validity of a statute which compelled testimony under a grant of full transactional immunity.[50] In considering *Counselman,* the *Brown* Court quoted with approval the language that a witness must be afforded "absolute immunity against future prosecution for the offense to which the question relates."[51] This led the Seventh Circuit to conclude that *Brown* stands for the proposition that only a grant of full *transactional* immunity can be a substitute for the fifth amendment privilege.[52]

The Seventh Circuit bolstered its conclusion that *Counselman* and *Brown* required transactional immunity by pointing to the fact that the *Brown* Court included four dissenting Justices who took the position that not even a transactional immunity statute can empower the state to

43. 449 F.2d at 39.

44. 440 F.2d at 955.

45. 449 F.2d at 40.

46. The court stated that "the holding of *Counselman* was that a statute prohibiting only the direct use of the compelled testimony was insufficient to displace the constitutional immunity . . . ." *Id.* at 35. Although a narrower ruling might have been made, the Seventh Circuit chose the instant case to give the privilege a broad scope, holding that nothing less than full transactional immunity would suffice.

47. 449 F.2d at 39, *quoting* Counselman v. Hitchcock, 142 U.S. 547, 585 (1892).

48. 449 F.2d at 35.

49. 161 U.S. 591 (1896).

50. Act of February 11, 1893, ch. 83, 27 Stat. 443.

51. 161 U.S. at 594. The language in the statute which led the Court in *Brown* to conclude that transactional immunity was required stated that "no person shall be prosecuted . . . for or on account of any transaction, matter, or thing concerning which he may testify . . . ." Act of February 11, 1893, ch. 83, 27 Stat. 443. The first protection flowing from this phrase was to preclude any future prosecution of the witness based not only upon his testimony, but also upon any leads or tips derived by the prosecuting sovereign from that testimony. In addition, a broader shield of protection provided that the witness could not be subjected to any future prosecution which could be shown to be logically related to his testimony. Under such a statute, the witness need only show that his compelled testimony bears a logical relationship to the transaction which was the subject of future prosecution. *See* Dixon, *Comment on Immunity Provisions,* in WORKING PAPERS OF THE UNITED STATES NATIONAL COMMISSION ON THE REFORM OF CRIMINAL LAW 1405, 1412 (1970).

52. 449 F.2d at 36 n.6.

compel an unwilling witness to incriminate himself.[53] The court further substantiated its holding by examining the evolution of the *Counselman* requirement.[54] In so doing, it stated:

> Those minimal constitutional requirements prohibit the federal government, absent a grant of absolute immunity from prosecution for any transaction to which his compelled testimony relates, from committing for contempt a witness who relies on his fifth amendment privilege and refuses to testify.[55]

Finally, the Seventh Circuit concluded that *Murphy* did not restrict or limit the *Counselman* requirement of transactional immunity.[56] Rather, the court regarded the *Murphy* decision as an attempt to deal with the constitutional limitations on the powers of the interrogating sovereign to grant immunity against prosecution by a non-interrogating jurisdiction.[57] Thus, *Murphy* attempted to reconcile, within the framework of federalism, the problem that the immunity granted a witness by one state infringes upon another state's independent power to prosecute.[58] The Seventh Circuit thereby restricted *Murphy* to the question of what type of immunity must be granted a witness in a dual sovereign setting,[59] and concluded that *Murphy* "did not reach the question of the extent of the immunity which the questioning jurisdiction must grant . . . ."[60]

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53. *See* Brown v. Walker, 161 U.S. 591, 610, 628 (1896) (Shiras, Gray, White & Field, JJ., dissenting). More recently, Justices Black and Douglas made it clear that they did not consider any immunity statute to be a valid device for compelling testimony. *See* Ullmann v. United States, 350 U.S. 422, 440 (1956) (dissenting opinion).

54. 449 F.2d at 36–37. In Ullmann v. United States, 350 U.S. 422 (1956), the Court reviewed the decisions of previous cases and upheld a *transactional* immunity statute. Justice Frankfurter stated that the 1893 transactional immunity statute upheld in *Brown* had become part of our constitutional fabric. 350 U.S. at 438. United States v. Monia, 317 U.S. 424 (1943), reaffirmed the view that *Counselman* required transactional immunity. McCarthy v. Arndstein, 266 U.S. 34 (1924), held that Congress could not require a witness to testify unless it provided complete immunity from prosecution. Hale v. Henkel, 201 U.S. 43 (1906), also recognized that *Counselman* required transactional immunity from prosecution.

55. 449 F.2d at 35.

56. The court also relied on an independent interpretation of the fifth amendment in reaching its decision. In leaving the viability of *Murphy* an open question, the court stated:

> [T]he language of the fifth amendment requires that any jurisdiction which seeks to compel a witness to testify grant full transactional immunity . . . .

Id. at 40. Mr. Justice Brennan expressed a similar view in Piccirillo v. New York, 400 U.S. 548 (1971):

> I believe that the Fifth Amendment's privilege against self-incrimination requires that any jurisdiction that compels a man to incriminate himself grant him absolute immunity under its laws from prosecution for any transaction revealed in that testimony.

Id. at 562 (dissenting opinion).

57. 449 F.2d at 39.

58. United States *ex rel.* Catena v. Elias, 449 F.2d 40, 44 (3d Cir. 1971). *See* note 42 *supra*. To deprive a state of the right to prosecute a violation of its criminal law on the basis of another state's grant of immunity would, in the opinion of that court, obstruct its administration of justice. 449 F.2d at 44.

59. 449 F.2d at 39. *See In re* Kinoy, 326 F. Supp. 407 (S.D.N.Y. 1971). Judge Motley stated for the court in *Kinoy* that *Murphy* "minimized interference with the law enforcement prerogatives of the non-questioning jurisdiction." 326 F. Supp. at 416.

60. 449 F.2d at 38.

The United States Court of Appeals for the Ninth Circuit, in a cursory opinion, took the position that *Murphy* overruled or limited the *Counselman* requirement of transactional immunity.[61] In that court's opinion, *Murphy* required only use immunity, and the *Counselman* language from which the theory of transactional immunity had been derived was considered mere dictum.[62] Moreover, in adopting *Murphy* as the controlling precedent by which immunity statutes are to be tested, the Ninth Circuit relied heavily on the Supreme Court's argument that a rule prohibiting the use of compelled testimony, as well as evidence derived therefrom, would leave "the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in absence of a state grant of immunity."[63] The court went on to hold that a grant of immunity from prosecution affords the witness greater protection than the fifth amendment, which itself affords no protection against prosecution.[64] The court reasoned, through its adoption of the *Murphy* holding, that if the prosecuting sovereign may not use the compelled testimony and its fruits, that testimony can in no way "lead" to the criminal prosecution of the witness.[65]

The Ninth Circuit also examined Mr. Justice White's concurring opinion in *Murphy* to further support the statute under attack in the instant case.[66] Inherent in Justice White's statement is the view that there must be an independent legitimate source for evidence other than the evidence and its fruits derived from the compelled witness:[67]

> In my view it is possible for a federal prosecution to be based on untainted evidence after a grant of federal immunity in exchange for testimony in a federal criminal investigation . . . . It is precisely this possibility of a prosecution based on untainted evidence that we must recognize.[68]

Using this language in combination with its adoption of *Murphy* as a replacement for the *Counselman* doctrine, the Ninth Circuit found the statute in question to be clearly in accord with the mandates of the fifth amendment.[69]

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61. 440 F.2d at 956.
62. *Id.*
63. *Id.* at 956–57. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964). *But see In re* Zicarelli, 55 N.J. 249, 261 A.2d 129 (1970), *prob. juris. noted sub nom.* Zicarelli v. State Comm'n of Investigation, 401 U.S. 933 (1971). In *Zicarelli*, a witness before a state investigatory agency refused to answer questions, pleading his fifth amendment privilege against self-incrimination. Thereafter, the witness was granted use immunity but, nevertheless, continued in his refusal to respond. The New Jersey supreme court held that the New Jersey statute's failure to grant transactional immunity from prosecution made it an inadequate basis for compelling an unwilling witness to incriminate himself.
64. 440 F.2d at 956.
65. *Id.* at 957. The court, in addition, placed reliance on Justice White's concurring opinion in *Murphy* to sustain the statute under attack in the instant case. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 100 (1964) (White, J., concurring).
66. 440 F.2d at 957.
67. *Id.*
68. 378 U.S. at 106 (White, J., concurring).
69. 440 F.2d at 957.

The Court in *Murphy* had made it clear that any evidence used in the prosecution of a witness must be free from all taint of compulsion.[70] This rule is based not on state legislative power to immunize against federal prosecution, but rather on the operation of the fifth amendment itself. In a non-immunity setting, Justice Harlan, speaking for the Court in *United States v. Blue*,[71] said that if the Government had acquired evidence in violation of the fifth amendment, the remedy would be to suppress the evidence and its fruits at trial, not to dismiss the indictment.[72] He further stated:

> So drastic a step [barring prosecution altogether] might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book.[73]

If the concept of immunity is accepted to this extent, as is suggested by Justice Harlan, then Justice White's concurring opinion in *Murphy* is persuasive.

The Ninth Circuit opinion in *Stewart* leaves a great deal to be desired in its justification for considering *Murphy* as a sub silentio overruling of *Counselman*. In reaching its conclusion, the *Murphy* Court carefully avoided language which would conflict with *Counselman*'s holding that the fifth amendment requires the questioning sovereign to grant transactional immunity.[74] Lack of even passing reference to the various precedents and legislative practices suggests that the *Murphy* Court did not consider that the situation presented to it — immunity in a dual sovereign setting — in any way involved the question in *Counselman* of immunity in a single sovereign setting.[75] This argument is further supported by the fact that the holding in *Murphy* mentioned both state and federal policies and not merely a sole sovereign.[76] The state and federal governments were spoken

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70. 378 U.S. at 79 n.18.

71. 384 U.S. 251 (1966). The defendant in *Blue* was charged in a criminal proceeding with wilfully attempting to evade income taxes. The district court dismissed the indictment on the basis that the defendant had been compelled to be a witness against himself because of the necessity of filing petitions for review of jeopardy assessment in the Tax Court. The Supreme Court held that the indictment should not have been dismissed, reasoning that even if the Government had acquired incriminating evidence in violation of the fifth amendment, the defendant would be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial.

72. *Id.* at 255.

73. *Id.*

74. *See* Wendel, *supra* note 8, at 371. Justice Goldberg quoted the portions of *Counselman* which spoke of immunizing testimony, but failed to mention the passage from which the transactional immunity requirement is derived. That Justice Goldberg would unintentionally fail to mention the large number of federal immunity statutes which immunized "any transaction, matter, or thing revealed in compelled testimony" seems unlikely. *Id.* at 370.

75. *Id.* at 371. In fact, the statute in *Murphy* granted transactional immunity with respect to the interrogating sovereign. This statute conferred immunity upon the witness to the extent that "such person shall not be prosecuted . . . for or on account of any transaction, matter, or thing concerning which . . . he gave answer or produced evidence . . . ." N.J. REV. STAT. § 32:23-86(5) (1956).

76. 378 U.S. at 79. *See* Wendel, *supra* note 8, at 372.

of in the sense that one acted for the other and, thus, in the light of dual sovereign limitations.[77]

The court's particular reliance upon Justice White's concurring opinion in *Murphy* further undermines the Ninth Circuit's position.[78] Justice White, stating that *Counselman* did not require transactional immunity,[79] cited four cases.[80] While these cases were cited to support this proposition, in fact they upheld immunity statutes which provided for transactional immunity. Justice White compounded the confusion by citing two federal immunity statutes which actually demanded *transactional* immunity.[81]

There are recent indications that the Supreme Court has recognized that *Murphy* was limited to grants of immunity in a dual sovereign situation. Two years following the decision in *Murphy,* the Court in *Albertson v. Subversive Activities Control Board*[82] struck down a federal immunity statute providing for only use immunity. The *Albertson* Court, making no mention of *Murphy,* based its decision on *Counselman* which, it said, had "held that no [immunity] statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege . . . ."[83] Subsequently, in *Stevens v. Marks,*[84] the Court stated:

> We need not stop to determine whether the immunity said to be conferred here — which merely prevents the use of the defendant's testimony or its fruits in any subsequent prosecution but, apparently, does not preclude prosecution based on "independent" evidence . . . —

77. 378 U.S. at 79. *See* note 40 *supra.*

78. 440 F.2d at 956.

79. Justice White stated:

> [*Counselman*] does not require that absolute immunity from state prosecution be conferred on a federal witness and the Court has declined on many occasions to so read it . . . .

378 U.S. at 104 (White, J., concurring).

80. Reina v. United States, 364 U.S. 507 (1960); Ullmann v. United States, 350 U.S. 422 (1956); Adams v. Maryland, 347 U.S. 179 (1954); Brown v. Walker, 161 U.S. 591 (1896). In *Reina,* the Court upheld immunity coextensive with the constitutional privilege — transactional immunity. *Adams* held that an act not providing complete immunity from prosecution was not broad enough to permit a federal grand jury to hear incriminating testimony. These cases cited by Justice White were also used by the Court of Appeals for the Seventh Circuit to illustrate the history of transactional immunity. *See* note 54 and accompanying text *supra.*

81. Act of July 18, 1956, ch. 620, tit. II, § 201, 70 Stat. 574 (repealed by 18 U.S.C. §§ 6001 *et seq.* (1970)); Act of June 25, 1948, ch. 645, 62 Stat. 833 (repealed by 18 U.S.C. §§ 6001 *et seq.* (1970)).

82. 382 U.S. 70 (1965). In *Albertson,* the Subversive Activities Control Board ordered petitioners to register and submit a list of its members. The Supreme Court held that the immunity provision did not preclude the use of an admission of Communist party membership as an investigatory lead, and the use of such an admission was barred by the privilege against self-incrimination.

83. *Id.* at 80, *quoting* Counselman v. Hitchcock, 142 U.S. 547, 585 (1892).

84. 383 U.S. 234 (1966). In *Stevens,* a New York City police officer refused to testify when subpoenaed before one of the grand juries investigating alleged bribery of public officials. The Court held that a witness has a right to refuse to incriminate himself until it can be demonstrated that the immunity offered him is as broad in scope as the privilege that it replaces.

> constitutes that "absolute immunity against future prosecution" about which the Court spoke in *Counselman* . . . .[85]

Justices Harlan and Stewart, dissenting in *Stevens,* intimated that the question of transactional immunity should only be considered after a full briefing by the parties in light of *Counselman.*[86]

Both of the above decisions assumed that *Counselman*'s holding remained in force and neither cited *Murphy.* Since there is evidence that the Supreme Court has not interpreted *Murphy* as overruling *Counselman* sub silentio or otherwise, it is submitted that the Ninth Circuit erroneously concluded that *Murphy* had such an effect.

It cannot reasonably be asserted that use immunity places an individual in substantially the same position as does the fifth amendment privilege. The individual is compelled to testify, and, if granted only a use immunity, is compelled to do so in matters for which he might ultimately be prosecuted.[87] He is still forced *to admit criminal conduct* for which he may be punished, albeit not on the basis of his compelled testimony.[88] If the witness is prosecuted after a grant of use immunity, he will be confronted with serious problems of proof.[89] Although *Murphy* indicated that the burden of proving that the independent evidence is untainted rests on the government,[90] there is the danger that this evidence, as a practical matter, will not be subject to challenge.[91] All of the evidence will be in the hands of the government, and it would be virtually impossible to tell what subtle influences the compelled testimony had on the decision to prosecute.[92] One must also assume the normal margin of human fallibility where many persons are involved in the investigation and ultimate prosecution of a criminal suspect.[93]

Mr. Justice Brennan has said that "use immunity literally misses half the point of the [fifth amendment] privilege, for it permits the com-

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85. *Id.* at 244.

86. *Id.* at 249 (Harlan & Stewart, JJ., dissenting). *See also* Piccirillo v. New York, 400 U.S. 548 (1971), where Justice Brennan stated in dissent:

> Mere use immunity, which protects the individual only against the actual use of his compelled testimony and its fruits, satisfies neither the language of the Constitution itself nor its values, purposes, and policies that the privilege was historically designed to serve and that it must serve in a free country.

Id. at 563. The Court in *Piccirillo,* denying a writ of certiorari, based its ruling upon a subsequent decision of the Court of Appeals of New York which had made it clear that transactional immunity must be granted to compel a witness to answer incriminating questions.

87. *See* Piccirillo v. New York, 400 U.S. 548, 565 (1971) (Brennan, J., dissenting).

88. *Id.* at 565 (Brennan, J., dissenting).

89. *See* United States *ex rel.* Catena v. Elias, 449 F.2d 40, 43 (3d Cir. 1971). The witness must be able to show that his compelled testimony influenced the decision to prosecute. In the investigation and prosecution of crimes, many persons are involved, and it would be next to impossible to determine whether any one of them used the coerced testimony during the process of investigation. *Id.* at 44.

90. 378 U.S. at 79 n. 18. *See* text accompanying note 55 *supra.*

91. The Seventh Circuit recognized such a danger. 449 F.2d at 35 n.5.

92. *Id.*

93. 400 U.S. at 568 (Brennan, J., dissenting).

pulsion without removing the criminality."[94] Nonetheless, it seems that the Ninth Circuit viewed the immunity–fifth amendment relationship in light of the interests of the Government in having criminal violators prosecuted.[95] In contrast, the Seventh Circuit emphasized the protection of the individual, including the psychological effects of compelling him to admit guilt under a fear of later prosecution. What is needed is a final evaluation as to which of these competing considerations will prevail, and therefore whether it is more desirable to immunize a witness and forgive his crimes in return for testimony which will help to convict others, or whether it is better to run the risk of losing some valuable testimony in exchange for a single conviction.

Consideration must also be given to the effect of compelled disclosures on the witness' defense to possible later criminal charges. If an individual who has been granted use immunity and is subsequently prosecuted elects to testify at trial in his behalf, he will be subject to cross–examination. The prosecutor will be able to tailor his questions on the basis of his knowledge of the prior compelled testimony and can do so without any reference to the testimony given under immunity.[96] This possibility may influence a defendant to forego his right to testify in his own behalf, even though he is advised that his prior compelled testimony cannot be used against him.[97] Thus, the only way to insure that immunity statutes and the fifth amendment privilege will not be abused in a subsequent prosecution by the questioning sovereign is to preclude prosecution by that sovereign.[98]

On the basis of the foregoing analysis, it is submitted that *Counselman*'s requirement of transactional immunity is still viable. *Murphy* must be considered in light of the dual sovereign situation which confronted the Court in that case, and its protection is insufficient when applied in a single questioning sovereign context.[99] Were courts totally free to consider the fifth amendment in its literal form as it relates to the issue presented in the instant cases, a different result might be reached — that of the Ninth Circuit.[100] However, the lower federal courts are constrained to follow the pronouncements of the Supreme Court, and, in this respect, the Court of Appeals for the Ninth Circuit should have waited for that Court to make such a "major extirpation of a part of our constitutional fabric,"

94. *Id.* at 567 (Brennan, J., dissenting). Justice Brennan stated:
[Transactional immunity] provides the individual with an assurance that he is not testifying about matters for which he may later be prosecuted. No question arises of tracing the use or non-use of information gleaned from the witness' compelled testimony. The sole question presented to a court is whether the subsequent prosecution is related to the substance of the compelled testimony.
Id. at 568–69.

95. *See* United States v. Blue, 384 U.S. 251 (1966).

96. *See* United States *ex rel.* Catena v. Elias, 449 F.2d 40, 45 (3d Cir. 1971).

97. *Id.*

98. *Id.*

99. Use immunity is also insufficient in a dual sovereign situation. However, in such a situation questions of federalism tend to modify the considerations which otherwise compel transactional immunity.

100. *See* United States *ex rel.* Catena v. Elias, 449 F.2d 40, 46 (3d Cir. 1971) (Adams, J., concurring). *See* note 42 *supra.*

and should have refrained from anticipating any such changes.[101] The Supreme Court has indicated a willingness to re-examine the *Counselman* doctrine in light of the immunity afforded by the Organized Crime Control Act of 1970.[102] In fact, the Court has recently heard argument on the very question that has divided the circuit and state courts for quite some time: the extent of an immunity grant given in exchange for compelled self-incrimination.[103] However, until the confusion is put to rest, the inferior courts should continue to adhere to the rationale of *Counselman* and *Brown*.

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101. *See In re* Kinoy, 326 F. Supp. 407, 419 (S.D.N.Y. 1971). Judge Motley stated:
> Since the Supreme Court has not overruled its requirement that as between the questioning sovereign and the witness only an immunity statute granting transactional immunity is sufficiently broad to replace the constitutional privilege, this court is without power to do so. Upholding the constitutionality of Title II of the Organized Crime Control Act of 1970 would represent a reversal of long established precedent. Clearly, any such major extirpation of a part of our "constitutional fabric," in addition to being decreed by the Congress, must be affirmed by the Supreme Court before this court is asked to do so.

Id.

102. As previously noted, the Supreme Court has granted certiorari in the *Stewart* case. Stewart v. United States, 440 F.2d 954 (9th Cir.), *cert. granted sub nom.* Kastigar v. United States, 402 U.S. 971 (1971). In addition, certiorari has been granted to the Supreme Court of Illinois in Sarno v. Crime Investigating Comm'n, 45 Ill. 2d 473, 259 N.E.2d 267 (1970), *cert. granted,* 401 U.S. 935 (1971). Probable jurisdiction has been noted in one other case. *In re* Zicarelli, 55 N.J. 249, 261 A.2d 129 (1970), *prob. juris. noted sub nom.* Zicarelli v. State Comm'n of Investigation, 401 U.S. 933 (1971).

103. Argument has been heard in the *Stewart, Sarno* and *Zicarelli* cases. 40 U.S.L.W. 3325 (U.S. Jan. 18, 1972). *See* note 102 *supra*.

CONSTITUTIONAL LAW — STATE AID TO NONPUBLIC ELEMENTARY AND SECONDARY SCHOOLS HELD VIOLATIVE OF THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT — FEDERAL STATUTE AUTHORIZING CONSTRUCTION GRANTS TO NONPUBLIC COLLEGES AND UNIVERSITIES HELD CONSTITUTIONAL.

Lemon v. Kurtzman (U.S. 1971)

Tilton v. Richardson (U.S. 1971)

"Congress shall make no law respecting an establishment of religion . . . ."[1]

In *Lemon v. Kurtzman*,[2] individual taxpayers, nonprofit corporations and unincorporated associations joined as plaintiffs in an action against officials of the Commonwealth of Pennsylvania and certain nonpublic schools within the Commonwealth, to enjoin the expenditure of state funds, which, they alleged, constituted an establishment of religion, an abridgement of the free exercise thereof, and a denial of equal protection. A three-judge federal district court[3] granted the Commonwealth's motion to dismiss the complaint for failure to state a claim for relief, holding that since the purpose and primary effect of the Pennsylvania statute was neither to advance nor inhibit religion, it violated neither the establishment nor the free exercise clauses.[4]

The Pennsylvania statute[5] authorized the Secretary of Education to "purchase" specified "secular educational services" from nonpublic

1. U.S. CONST. amend. I, § 1. The establishment clause of the first amendment was made applicable to the states by the fourteenth amendment. Cantwell v. Connecticut, 310 U.S. 296 (1940).

The *Lemon* Court placed great emphasis upon the precise language of the first amendment.

> Its authors did not simply prohibit the establishment of a state church or a state religion . . . . Instead they commanded that there should be "no law *respecting* an establishment of religion."

Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (emphasis supplied by the Court). A law, it was felt, could be one

> "respecting" the forbidden objective while falling short of its total realization. . . . A given law might not *establish* a state religion but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.

Id. (emphasis supplied by the Court).

The Court's decisions in these cases rest heavily upon this questionable excursion into linguistics. It furnishes the constitutional underpinnings for the new entanglement rationale — a crucial instance of Auden's insight into how the words of dead men are "modified in the guts of the living." Auden, *In Memory of W.B. Yeats*, in AN OXFORD ANTHOLOGY OF ENGLISH POETRY 1297 (2d ed. H. Lowry & W. Thorp 1956). That the Court's distinctions between these cases are more visceral than cerebral is suggested in the text accompanying note 67 *infra*.

2. 310 F. Supp. 35 (E.D. Pa. 1969), *rev'd*, 403 U.S. 602 (1971).

3. Since the suit challenged the constitutionality of a statute of statewide application, a three-judge court was convened pursuant to 28 U.S.C. §§ 2281, 2284 (1970).

4. Lemon v. Kurtzman, 310 F. Supp. 35 (E.D. Pa. 1969). For a discussion of the *Lemon* case in the federal district court, *see* 15 VILL. L. REV. 477 (1970).

5. Nonpublic Elementary and Secondary Education Act, PA. STAT. tit. 24, §§ 5601 *et seq.* (Supp. 1971).

schools.[6] The Commonwealth directly reimbursed such schools for their actual expenditures for teachers' salaries, textbooks and instructional materials.[7] To qualify for such reimbursement, a nonpublic school was obliged to maintain prescribed accounting procedures identifying the separate costs of the secular educational service which the Commonwealth was purchasing.[8] These accounts were subject to State audit.[9] Courses for which reimbursement might be obtained were limited to those "presented in the curricula of the public schools," and specifically to the "secular" subjects of mathematics, modern foreign languages, physical science and physical education.[10] Textbooks and instructional materials had to be approved by the Secretary,[11] and no reimbursement could be made for any course containing "any subject matter expressing religious teaching, or the morals or forms of worship of any sect."[12]

In *DiCenso v. Robinson*,[13] citizens and taxpayers of Rhode Island brought suit, on the same grounds alleged in *Lemon*, against state officials to enjoin the expenditure of state funds under a statute similar to that in Pennsylvania. After hearing evidence on the nature of the secular instruction offered in the state's Roman Catholic schools, the three-judge federal district court[14] found that, although "concern for religious values [did] not necessarily affect the content of secular subjects in diocesan schools,"[15] the parochial school system was "an integral part of the religious mission of the Catholic Church."[16] The court concluded that the Rhode Island act violated the establishment clause in that it fostered "excessive entanglement" between government and religion.[17]

The Rhode Island statute[18] authorized state officials to supplement the salaries of teachers of secular subjects in nonpublic elementary schools

6. *Id.* § 5604.

7. *Id.* "Instructional materials" mean books, documents, pictorial or graphic works, maps or any printed or published instructional material. This term includes portable instructional equipment, but does not include non-portable equipment or items normally affixed to the realty or forming a part of a building structure. PA. DEP'T OF PUBLIC INSTRUCTION, RULES AND REGULATIONS FOR IMPLEMENTING NONPUBLIC ELEMENTARY AND SECONDARY EDUCATION ACT: DEFINITIONS § 5 (1969).

8. PA. STAT. tit. 24, § 5607 (Supp. 1971).

9. *Id.*

10. *Id.* § 5604.

11. *Id.* § 5604(i).

12. *Id.* § 5603(3).

13. 316 F. Supp. 112 (D.R.I. 1970), *aff'd sub nom.* Lemon v. Kurtzman, 403 U.S. 602 (1971).

14. *See* note 3 *supra.*

15. 316 F. Supp. at 117.

16. *Id.*

17. *Id.* at 122. The conflict between the federal district court decisions in Rhode Island and Pennsylvania is largely attributable to the fact that *Lemon* was decided before (November 28, 1969), and *DiCenso* after (June 15, 1970), *Walz v. Tax Commission* (May 4, 1970), which first crystallized the entanglement rationale. *Walz* is cited at 397 U.S. 664.

18. Salary Supplement Act, R.I. GEN. LAWS ANN. §§ 16-51-1 *et seq.* (Supp. 1970).

by paying directly to the teacher an amount not in excess of fifteen per cent of his current annual salary, limited, however, to the maximum paid to teachers in Rhode Island's public schools.[19] Further, the Salary Supplement Act required that teachers eligible for salary supplement teach only those subjects offered in the state's public schools,[20] use "only teaching materials which are used in the public schools,"[21] and agree in writing "not to teach a course in religion for so long as or during such time as he or she receives any salary supplements" under the Act.[22]

The United States Supreme Court decided that both state statutes were unconstitutional, *holding* that the "cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion." *Lemon v. Kurtzman,* 403 U.S. 602, 614 (1971).

In *Tilton,*[23] taxpayer-residents of Connecticut instituted an action against federal officials and certain church-related colleges and universities located in Connecticut, challenging the constitutionality of expenditures of federal funds under Title I of the Higher Education Facilities Act of 1963[24] as violative of the religion clauses of the first amendment. A three-judge federal district court[25] upheld the federal act, although the institutional defendants were sponsored by religious organizations. The court concluded that Title I authorized grants to church-related colleges and universities, and that the Act had neither the purpose nor the effect of promoting religion.[26]

Title I of the federal act provides for construction grants for buildings and facilities used exclusively for undergraduate secular educational purposes.[27] The Act authorizes federal grants and loans up to fifty per cent of the total cost[28] to institutions of higher education for the construction

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19. *Id.* §§ 16-51-3, 16-51-4. The subsidy was available only to those teachers certified by the State Board of Education in substantially the same manner as public school teachers. *Id.* § 2. In addition, the recipient must have taught in a nonpublic school in which the average per-pupil expenditure on secular education was less than the average in the state's public schools. *Id.* §§ 16-51-2(1), 16-51-3.

20. *Id.* § 16-51-3(1).

21. *Id.* § 16-51-3(4).

22. *Id.* § 16-51-3(5).

23. Tilton v. Finch, 312 F. Supp. 1191 (D. Conn. 1970), *modified sub nom.* Tilton v. Richardson, 403 U.S. 672 (1971).

24. 20 U.S.C. §§ 701 *et seq.* Federal funds were used for five projects at four institutions: (1) a library building at Sacred Heart University; (2) a music, drama and arts building at Amhurst College; (3) a science building at Fairfield University; (4) a library building at Fairfield; and (5) a language laboratory at Albertus Magnus College. Tilton v. Richardson, 403 U.S. 672, 676 (1971).

25. The court was convened pursuant to 28 U.S.C. §§ 2282, 2284 (1970).

26. Tilton v. Finch, 312 F. Supp. 1191, 1198-99 (D. Conn. 1970).

27. Higher Education Facilities Act of 1963, 20 U.S.C. §§ 711 to 721 (1970).

28. *Id.* § 717(b).

of "academic facilities."[29] Further, under the Act, the United States retains an interest for twenty years in any facility constructed with its funds.[30] Congress reasoned that after twenty years "the public benefit accruing to the United States" from the use of the federally financed facility would "equal or exceed in value" the amount of the federal grant.[31] In this respect, the Court unanimously agreed that the Act transgressed the religion clauses, *holding* that "[t]he restrictive obligations of a recipient institution . . . cannot, compatible with the Religion Clauses, expire while the building has substantial value."[32] The Court found, however, that the twenty year limit provision of the Act was severable, and that the entire Act need not be invalidated since it had neither the purpose nor primary effect of advancing religion and did not foster excessive government entanglement with religion.[33] It was therefore a constitutionally valid exercise of legislative power. *Tilton v. Richardson,* 403 U.S. 672 (1971).

The history of the Court's decisions in this area was succinctly summarized by Justice White:

> No one in these cases questions the constitutional right of parents to satisfy their state-imposed obligation to educate their children by sending them to private schools, sectarian or otherwise, as long as those schools meet minimum standards established for secular instruction. The States are not only permitted, but required by the Constitution, to free students attending private schools from any public school attendance obligation. *Pierce v. Society of Sisters,* 268 U.S. 510 (1925). The States may also furnish transportation for students, *Everson v. Board of Education,* 330 U.S. 1 (1947), and books for teaching secular subjects to students attending parochial and other private as well as public schools, *Board of Education v. Allen,* 392 U.S. 236 (1968); we have also upheld arrangements whereby students are released from public school classes so that they may attend religious instructions. *Zorach v. Clauson,* 343 U.S. 306 (1952). Outside the field of education, we have upheld Sunday closing laws, *McGowan v. Maryland,* 366 U.S. 420 (1961), state and federal laws exempting church property and church activity from taxation, *Walz v. Tax Commission,* 397 U.S. 664 (1970), and govern-

29. *Id.* § 711. "Academic facilities" are defined as:
[S]tructures suitable for use as classrooms, laboratories, libraries, and related facilities necessary or appropriate for instruction of students or for research . . . programs . . . .
Id. § 751(a)(1). Expressly excluded is:
[A]ny facility used or to be used for sectarian instruction or as a place for religious worship, or . . . any facility which . . . is used or to be used primarily in connection with any part of the program of a school or department of divinity . . . .
Id. § 751(a)(2).

30. *Id.* § 754(a).

31. *Id.* If, during this period, the recipient institution violated the statutory conditions, the United States would be entitled to recover a proportional amount of the existing value as determined by the ratio of the federal grant to the original cost of the facility. *Id.* § 754(b).

32. Tilton v. Richardson, 403 U.S. 672, 683 (1971). The Court reasoned that a structure, built with federal funds, would be of "some value" to a religious body even after twenty years, and that the unrestricted use of that property would be, in effect, a contribution to a religious body. *Id.*

33. *Id.* at 684.

> mental grants to religious organizations for the purpose of financing improvements in the facilities of hospitals managed and controlled by religious orders. *Bradfield v. Roberts,* 175 U.S. 291 (1899).[34]

The Chief Justice, who delivered the opinion of the Court in each case,[35] prefaced the decisions with an apology that "[c]andor compels acknowledgement . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."[36] The Court hinged its decisions on the "cumulative criteria" developed in previous establishment cases:

> Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen,* 392 U.S. 236, 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion." *Walz, supra,* at 674.[37]

As to the first part of its test, the Court concluded that the state statutes challenged were decisive evidence of legislative intent.[38] The Court further indicated that Congress clearly intended to include as beneficiaries of the federal act all colleges and universities regardless of any affiliation with or sponsorship by religious bodies.[39]

The second phase of the Court's test requires that the primary effect of challenged legislation be neither to advance nor inhibit religion. While ostensibly expressing the opinion that it need not reach the primary effect portion of its test, it is submitted that the Court, in its determination of the effect of the challenged legislation, actually distinguished the permissible

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34. Lemon v. Kurtzman, 403 U.S. 602, 663 (1971) (White, J., concurring in part, dissenting in part).

35. In *Lemon,* Justices Black, Douglas, Harlan, Stewart and Blackmun joined the Chief Justice to form the majority. Justice Douglas concurred, joined by Justice Black. Justice Brennan concurred in a separate opinion. Justice White concurred in part and dissented in part. In *DiCenso,* Justice Marshall joined the majority in addition to those above. Justice Marshall took no part in the consideration or decision of the *Lemon* case.

In *Tilton,* Justices Harlan, Stewart and Blackmun joined the Chief Justice writing for a plurality. Justice White concurred; Justice Douglas dissented in part, joined by Justices Black and Marshall; Justice Brennan also dissented.

36. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971); Tilton v. Richardson, 403 U.S. 672, 678 (1971). Most members of the Court would agree with Justice White that:

> [N]either affirmance nor reversal of any of these cases follows automatically from the sparse language of the First Amendment, from its history, or from the cases of this Court construing it . . . .

Lemon v. Kurtzman, 403 U.S. 602, 662 (1971) (White, J., concurring in part, dissenting in part). Chief Justice Burger had remarked earlier that the religion clauses were "not the most precisely drawn portions of the Constitution." Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

37. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971). For a discussion of the genesis and development of the Court's tripartite test, *see* 16 VILL. L. REV. 374 (1970).

38. In *Lemon,* the Court stated:

> [T]he statutes themselves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. There is no reason to believe the legislatures meant anything else.

403 U.S. at 613.

39. Tilton v. Richardson, 403 U.S. 672, 676–77 (1971).

federal program from the impermissible state programs. It was the belief of the Court that nonpublic elementary and secondary schools, the primary beneficiaries of both state programs, were "factories of the faithful."[40] That, more than any other consideration, seems to have motivated the Court in deciding these cases as it did. The Court repeated the proposition that the religious and educational functions of church-related elementary schools are separable.[41] However, this proposition was qualified as follows:

> In *Allen* the Court acknowledged that secular and religious teachings were not necessarily so intertwined that secular textbooks furnished to students by the State were in fact instrumental in the teaching of religion . . . . *In the abstract* we have no quarrel with this conclusion.[42]

In its analysis of the specific facts at hand, however, the Court stated:

> We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of *pre-college education. The conflict of functions inheres in the situation.*[43]

The Court appears to have assumed, notwithstanding its protestations to the contrary, that religion so permeates the secular education provided by the nonpublic elementary and secondary schools of Pennsylvania and Rhode Island as to make their secular and religious functions inseparable. It has, in fulfillment of the fears of Professors Valente and Stanmeyer, raised to the status of a "constitutional presumption" the conviction that "all education in [elementary and secondary] church-related schools amounts to sectarian activity."[44] In this respect, the Court is apparently

40. Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).
41. *Id.* at 613.
42. *Id.* (emphasis added).
43. *Id.* at 617 (emphasis added).
44. Valente & Stanmeyer, *Public Aid to Parochial Schools — A Reply to Professor Freund,* 59 GEO. L.J. 59, 66 (1970).

Justice Jackson, concurring in McCollum v. Board of Educ., 333 U.S. 203, 237-38 (1947), contended:

> It is idle to pretend that this task is one for which we can find in the Constitution one word to help us as judges to decide where the secular ends and the sectarian begins in education. Nor can we find guidance in any other legal source. It is a matter on which we can find no law but our own prepossessions.

The Court reasserted the "three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" Lemon v. Kurtzman, 403 U.S. 602, 612 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970). Or, in the words of Justice Brennan:

> What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice . . . .

Lemon v. Kurtzman, 403 U.S. 602, 643 (1971) (separate opinion).

The Court in these cases appears to have enshrined its complex of personal "prepossessions" into constitutional doctrine; to have substituted "presumption for proof that religion is or would be taught in state financed secular courses or . . . that enforcement measures would be so extensive as to border on a free exercise violation." *Id.* at 670. (White, J., concurring in part, dissenting in part).

in good company.[45]

The Court's understanding of the proper relationship of state to church is, most basically, that the first amendment "requires the state to be neutral in its relations with groups of religious believers and non-believers;"[46] albeit a "benevolent neutrality."[47] The limitations of "neutrality" as an analytical tool, however, are especially noticeable when applied in the instant state cases. If neutrality is properly understood as absolute separation — the state as much as possible ignoring the existence of church-related schools — then the constitutionality of aid will be judged by one standard. If, however, neutrality is understood as an active, positive relationship recognizing the existence of dual functions, secular and religious, of these church-related schools, then a different standard must be applied. The essential conflict in these cases can be more clearly illustrated by juxtaposing two often cited excerpts from *Everson:*

> No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.[48]
>
> [The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.[49]

It was, ironically, the statutory restrictions, designed to guarantee the separation between secular and religious educational functions of parochial schools, and to insure that state financial aid supported only the former, that constituted the "excessive entanglement" between government and religion upon which the Court based its holding.[50]

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45. *See* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle,* 81 HARV. L. REV. 513 (1968) [hereinafter cited as Giannella, *Religious Liberty*]. Professor Giannella states:

> I believe that one conclusion should be widely accepted: the state should be allowed more involvement with religion on the higher levels of education than on the lower levels.

Id. at 516. *See also* Freund, *Public Aid to Parochial Schools,* 82 HARV. L. REV. 1680, 1691 (1969).

For a reflective discussion of the practical value of the Court's decisions in these cases in predicting the fate of any of the presently discussed forms of aid (including vouchers, tax rebates and the like), *see* Giannella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement,* 1971 SUP. CT. REV. 147.

46. Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

47. Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

> When the state encourages religious instruction . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.

Zorach v. Clauson, 343 U.S. 306, 313–14 (1952).

48. 330 U.S. at 16.

49. *Id.* at 18.

50. Lemon v. Kurtzman, 403 U.S. 602, 614–22 (1971). The Court stated:

> We need not decide whether these legislative precautions restrict the principal or primary effect of the programs to the point where they do not offend the Religion Clauses, for we conclude that the cumulative impact . . . of the statutes involve[d] excessive entanglement between government and religion.

Id. at 613–14.

Moreover, the Court expressed its concern for the "divisive political potential" inherent in state programs of financial assistance to nonpublic schools, and indicated

By the third phase of its test, prohibiting excessive government involvement with religion, the Court isolated another aspect of the effect of legislation, which, if objectionable, would *independently* render it unconstitutional.[51] It is submitted that the second and third phases of the Court's test are both "effect" tests; the second focuses upon the effect of legislation on religion; the third focuses upon the effect of legislation on the relationship existing between church and state. It is clear that the two tests are to be applied in close connection.[52]

In order to determine whether the government activity in these cases was constitutionally permissible, the Court examined:

> the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.[53]

It is certainly relevant to consider the character and purposes of institutions benefited in order to determine whether they are properly termed "religious."[54] It is also relevant to consider the resulting administrative relationship between the donor and the recipient, in order to determine the degree, if any, of "entanglement" or governmental involvement with religion. However, in distinguishing the instant cases, it is the second

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that state aid to parochial schools would inevitably lead to political division along religious lines, which would, in turn, "tend to confuse and obscure other issues of great urgency." *Id.* at 622–23. The Court's analysis is similar to the position of Professor Freund:

> A choice between the permissible and the forbidden is in essence a choice whether to leave the issue to the political process . . . or to defuse the political issue. Ordinarily I am disposed, in grey-area cases of constitutional law, to let the political process function. . . . The religious guarantees, however, are of a different order. . . . This basic preference may help to account for what otherwise may seem a too rigid, and not sufficiently permissive, view of constitutional commands.

Freund, *supra* note 45, at 1691–92. It is clear, however, that "[i]f avoidance of strife were an independent value, no legislation could be adopted on any subject which aroused strong and divided feelings." Schwartz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692, 711 n.5 (1968).

It is submitted that legislative attempts to make funds available to parochial schools comprise only one aspect of the multifaceted public education issue — certainly an issue of "great urgency" and of legitimate political concern to legislators and their constituents. The Pennsylvania Legislature in its declaration of policy stated:

> That, should a majority of parents of the present nonpublic school population desire to remove their children to the public schools of the Commonwealth, an intolerable added financial burden to the public would result, as well as school stoppages and long term derangement and impairment of education in Pennsylvania.

Nonpublic Elementary and Secondary Education Act, PA. STAT. tit. 24, § 5602(6) (Supp. 1971).

51. *See* text accompanying note 49 *supra*.

52. The relationship between these two phases of the Court's test appears to be such that where the degree of advancement of religion is slight and subordinate, a greater degree of entanglement would be justified. On the other hand, where the advancement of religion is significant and substantial, a significantly lesser degree of entanglement would be sufficient to render a program unconstitutional.

53. Lemon v. Kurtzman, 403 U.S. 602, 615 (1971).

54. Justice Brennan advocated remand in *Tilton* "limited to the direction of a hearing to determine whether the four institutional appellees were sectarian institutions" which he defined as institutions having a "purpose or function to propagate or advance a particular religion." *Id.* at 642, 661.

factor which the Court emphasized; *i.e.,* the nature of the aid which the state provides.[55]

As to the character and purposes of the institutions benefited, the Court disposed of both state cases upon the assumption that the parochial school system was "an integral part of the religious mission of the Catholic Church."[56] It should be noted, however, that the challenges to the statutes were in different stages of litigation. In *DiCenso,* there had been a trial on the merits at which evidence had been taken, supplying the Court with a record upon which to make factual determinations necessary to apply its factually-oriented tests. In *Lemon,* no evidence had been taken.[57] There were significant factual differences between the two cases. Teachers in Roman Catholic schools had been the sole beneficiaries of the Rhode Island statute,[58] while in Pennsylvania, other denominational and nondenominational private schools had received funds.[59] Further, the Rhode Island statute provided only for salary supplements to teachers,[60] while the Pennsylvania Act provided for reimbursement for textbooks and instructional materials,[61] which appeared to have the Court's imprimatur.[62] Although both statutes contained severability clauses,[63] the provisions for severance of invalid applications from valid applications appear to have been ignored by the Court.

In dealing with the federal statute, the Court stated that the cardinal principle of statutory construction was to save, not destroy the statute.[64] Unless the legislature clearly evidences its intent not to enact the constitutionally valid provisions, independently of those which are infirm, the invalid portion may be deleted, provided the valid provisions are operative of themselves.[65] The absence of an express severability provision does not dictate the demise of an entire statute.[66] By construing the federal statute involving aid to higher education to be severable, while at the same time absolutely ignoring an express severability clause in each of the respective state statutes providing aid at the elementary and secondary levels, the

55. *Id.* at 616; Tilton v. Richardson, 403 U.S. 672, 687 (1971).

56. Lemon v. Kurtzman, 403 U.S. 602, 616 (1971). The assumption was based on the record in the Rhode Island case and on allegations in the complaint in the Pennsylvania case which were, of course, assumed to be true since the complaint had been dismissed for failure to state a claim for relief. *Id.* at 616, 620.

57. *See* note 56 *supra.*

58. Lemon v. Kurtzman, 403 U.S. 602, 615 (1971).

59. *Id.* at 610.

60. Salary Supplement Act, R.I. GEN. LAWS ANN. §§ 16-51-1 *et seq.* (Supp. 1970). *See* text accompanying notes 18-22 *supra.*

61. Nonpublic Elementary and Secondary Education Act, PA. STAT. tit. 24, §§ 5601 *et seq.* (Supp. 1971). *See* text accompanying notes 5-12 & 50 *supra.*

62. *See* Board of Educ. v. Allen, 392 U.S. 236 (1968).

63. Salary Supplement Act, R.I. GEN. LAWS ANN. § 16-51-8 (Supp. 1970); Nonpublic Elementary and Secondary Education Act, PA. STAT. tit. 24, § 5609 (Supp. 1971).

64. Tilton v. Richardson, 403 U.S. 672, 684 (1971).

65. *Id.*

66. *Id.*

Court indicated its aforementioned willingness to distinguish between aid at these differing levels.[67]

Appellees in the *Lemon* case have petitioned for rehearing and a supplemental opinion distinguishing the Pennsylvania from the Rhode Island cases on the above grounds.[68] Since, however, both statutes were found to be unconstitutional on their face, it is doubtful whether the petition will be granted, and, if granted, it is even more unlikely that reargument would cause the Court to reverse its position. In *Lemon,* Justice White would have reversed the dismissal of the complaint and remanded the case for trial, as appellees now request.[69] However, since it could hardly be submitted that any state's Roman Catholic school system was not "an integral part of the religious mission of the Catholic Church,"[70] it would seem that the Court was, at least, consistent in deciding these cases as it did, and in not remanding for further proceedings.[71] In *Board of Education v. Allen,*[72] the Court refused to hold, without evidence about "particular schools, particular courses, particular teachers, or particular books,"[73] that a statutory program of lending textbooks in secular subjects to church-related schools challenged therein constituted a violation of the establishment clause.[74] In *DiCenso,* and particularly in *Lemon,* the Court has largely rejected such an attitude toward the need for detailed evidence expressed in *Allen.*[75]

As to the nature of the aid provided, the Court emphasized that it has in the past "permitted the States to provide church-related schools

67. In *Tilton* a majority of the Court felt that the federal program had "less potential for realizing the substantive evils against which the Religion Clauses were intended to protect" and substantially less "potential for divisive religious fragmentation in the political arena." Tilton v. Richardson, 403 U.S. 672, 688 (1971). However, Justice White convincingly criticized the attempted distinction between the recurring nature of the payments in the state plans involving annual appropriations (which the majority considered seeds of controversy and friction) as opposed to the one-time grant under the federal program. "It is," he said, "apparent that federal interest in any grant will be a continuing one since the conditions attached to the grant must be enforced." Lemon v. Kurtzman, 403 U.S. 602, 669 (1971) (White, J., concurring in part, dissenting in part).

68. Petition of Appellees for Rehearing and Supplemental Opinion, Lemon v. Kurtzman, 403 U.S. 602 (1971).

69. Lemon v. Kurtzman, 403 U.S. 602, 671 (1971) (White, J., concurring in part, dissenting in part).

70. *Id.* at 616.

71. The critical finding would be that education is "an integral part of the religious mission of the Catholic Church." The oft-repeated observation of the District Court in *DiCenso* was characterized by Justice White as "an observation that should neither surprise nor alarm anyone, especially judges who have already approved substantial aid to parochial schools in various forms." *Id.* at 666 (White, J., concurring in part, dissenting in part).

72. 392 U.S. 236 (1968).

73. *Id.* at 248.

74. *See* Valente, *Aid to Church Related Education — New Directions Without Dogma,* 55 VA. L. REV. 579, 612 (1969). The author suggested:

> In subsidized subjects such as the natural sciences, vocational skills, and language studies, which are not easily susceptible to substantial religious coloration, the de minimis concept may be invoked as a matter of judicial discretion, at least where countervailing proofs are absent.

Id.

75. Lemon v. Kurtzman, 403 U.S. 602, 617 (1971).

with secular, neutral, or non-ideological services, facilities, or materials."[76] In deciding the instant cases, the Court attributed great significance to the fact that teachers have a "substantially different ideological character than books," in terms of "potential for involving some aspect of faith or morals in secular subjects."[77] It is submitted that whether a state chooses to supplement the salaries of individual teachers or to supply those teachers with what is thought to be an objective or neutral text from which to teach should be of absolutely no import in determining whether or not that particular state aid is constitutional, since both forms of aid are directly translatable into financial aid. Moreover, aid in each case flows to the same transaction — the secular learning process, involving teacher, text and student.

A majority of the Court recognized that total separation between church and state is neither possible nor constitutionally required.[78] Bus rides,[79] secular textbooks[80] and tax exemptions[81] extended to religious institutions or their individual members have been upheld. In each case, the Court examined the nature of the aid in depth, leading however to distinctions, like those in the instant cases, which are patently artificial.

In *Tilton,* the Court emphasized the non-ideological character of the aid which government provided by way of buildings.[82] In *Lemon* and *DiCenso,* however, where state programs "subsidize teachers, either directly or indirectly,"[83] it felt that such great governmental surveillance would be required to guarantee that state salary aid would not, in fact, subsidize religious instruction, that excessive entanglement with religion would necessarily ensue.[84] The majority argued that where government

76. *Id.* at 616.

77. *Id.* at 617. The Court emphasized the "potential if not actual hazards" of state aid in the form of salary supplements to teachers. *Id.* at 618. It thus characterized the relationship of the faculty to the administration in elementary and secondary schools of the Rhode Island Roman Catholic diocese:

> The teacher is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith.

Id. at 618. However, it is submitted that to extend this reasoning to suggest, as does the Court, that potential hazards are "not lessened by the fact that most of the lay teachers are of Catholic faith" is improper. *Id.* at 618.

78. *Id.* at 614. For a recitation of the pervasive interrelationship of church and state in this country, *see* Engel v. Vitale, 370 U.S. 421, 437–42 (1962) (Douglas, J., concurring).

79. Everson v. Board of Educ., 330 U.S. 1 (1947).

80. Board of Educ. v. Allen, 392 U.S. 236 (1968).

81. Walz v. Tax Comm'n, 397 U.S. 664 (1970). It is submitted that if, as in *Walz,* tax exemptions for real property owned by religious organizations and used for religious worship are constitutionally permissible, the decisions of the Court in these cases border on intellectual dishonesty. Such preferential tax treatment clearly advances religion by direct economic measures which impose on the state a continuing burden to ascertain that exempt property is in fact being used for religious worship, which is certainly an awkward position for government under the religion clauses of the first amendment. For a discussion of the relationship, in fact interchangeability, of tax preferences and direct expenditures, *see* Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Governmental Expenditures,* 83 HARV. L. REV. 705 (1970).

82. Tilton v. Richardson, 403 U.S. 672, 687–88 (1971).

83. *Id.* at 687.

84. *Id.* at 687–88.

provided secular, neutral or non-ideological services, facilities or materials, the risk of government aid to religion and the corresponding need for surveillance were reduced.[85] It is, however, difficult to understand how the same sum of money, appropriated from the coffers of the state to benefit nonpublic educational institutions, can be constitutional or not, depending upon whether it is spent to supply secular texts, buildings in which secular courses are taught, or teachers of those secular subjects.[86]

85. Advocates of the strict no-aid position have consistently objected to the nature of the aid criterion for determining constitutionality. In *Lemon* and *DiCenso,* Justice Douglas reasoned:

> The school is an organism living on one budget. What the taxpayers give for the salaries of those who teach only the humanities or science, without any trace of proselytizing enables the school to use all of its own funds for religious training.

403 U.S. at 641.

In *Tilton,* the Douglas rationale was once again that:

> A parochial school operates on one budget. Money not spent for one purpose becomes available for other purposes. Thus the fact that there are no religious observances in federally financed facilities is not controlling because required religious observances will take place in other buildings. . . . Money saved from one item in the budget is free to be used elsewhere. By conducting religious services in another building, the school has — rent free — a building for nonsectarian use.

403 U.S. at 693, 695.

In Abington School Dist. v. Schempp, 374 U.S. 203, 229–30 (1963), in which the Court banned prayers from the public schools, Justice Douglas had argued that:

> Financing a church either in its strictly religious activities or in its other activities is equally unconstitutional as I understand the Establishment Clause. Budgets for one activity may be technically separable from budgets for others. But the institution is an inseparable whole, a living organism, which is strengthened in any department by contributions from other than its own members.
>
> Such contributions may not be made by the State even in a minor degree without violating the Establishment Clause. [Footnotes omitted.]

In Board of Educ. v. Allen, 392 U.S. 236, 253–54 (1968), Justice Black, dissenting, asserted that:

> I still subscribe to the belief that tax-raised funds cannot constitutionally be used to support religious schools, buy their school books, erect their buildings, pay their teachers, or pay any other of their maintenance expenses. . . .

From the very first, Justice Rutledge, dissenting in Everson v. Board of Educ., 330 U.S. 1, 48 (1947), had argued that:

> Payment of transportation is no more, nor is it any the less essential to education, whether religious or secular, than payment for tuitions, for teachers' salaries, for buildings, equipment and necessary materials. Nor is it any the less directly related, in a school giving religious instruction, to the primary religious objective all those essential items of cost are intended to achieve.

Professor Giannella places such statements in their proper context:

> The establishment evil here envisioned is that church funds used to provide secular instruction in church schools are released for application to religious uses. But this is a simplistic application of a simplistic no-aid theory of nonestablishment. This approach carries the strict no-aid theory to its improper and absurd extreme of denying religious interests the opportunity to share in the strictly secular benefits of the prevailing civic order. One bound so slavishly to the logic of the no-aid position should deny parochial school students the opportunity to use public libraries in preparing school assignments. Indeed, he is required to ask whether children attending churches preaching personal study of the Bible should be barred from the public schools so as not to relieve those churches of the heavy financial burden of teaching their members to read. All these examples illustrate the absurdity of claiming that the state aids religion by taking over public functions previously performed by the churches.

Giannella, *Religious Liberty, supra* note 45, at 567–68.

86. A majority of the Court (Justices White, Douglas, Black, Marshall and Brennan), although coming to different conclusions, were in agreement that the state and federal legislation involved in these cases were more similar than dissimilar and that either all of them or none of them were constitutionally permissible. These

Likewise, it is difficult to comprehend why a one-time, multi-million dollar construction grant (*Tilton*) is constitutionally preferable to annual allocations of smaller amounts of funds over a period of years (*Lemon* and *DiCenso*).[87]

The Court indicated that whether or not "excessive entanglement" characterized the relationship between church and state under specific legislation, there was an independent measure of its constitutionality under the religion clauses.[88] Further, the Court stated that certain factors substantially diminished the extent and the potential danger of entanglement under the federal, as compared to the state, programs.[89] The most crucial distinction was, as suggested above, the Court's belief that there are "significant differences between the religious aspects of church–related institutions of higher learning and parochial elementary and secondary schools."[90] The Court compared the skepticism of college students to the malleability of children of impressionable ages in the lower grades.[91] In support of its position, the Court emphasized that theology courses at higher educational levels, although required, were taught "according to the academic requirements of the subject matter and the teacher's concept of professional standards," and "covered a range of human religious experiences . . . not limited to courses about the Roman Catholic

Justices reasoned that both state and federal programs included educational institutions in which the progagation and advancement of a particular religion is one function of that institution, and that the benefit to those institutions is not essentially different whether it be in the form of salary supplements or construction grants. They failed to see:

> any significant difference in the Federal Government's telling the sectarian university not to teach any non-secular subjects in a certain building, and Rhode Island's [and Pennsylvania's] telling the Catholic school teacher not to teach religion.

403 U.S. at 660 (Brennan, J.). These Justices rejected the myth that the "non–ideological" character of a building, as contrasted with a teacher, reduced the need for policing. The federal government, Justice Brennan explained, imposed restrictions on every class taught in the federally-financed building, and it is the courses and teachers and not the building which government must police. *Id.* at 661.

87. The wit of Justice Douglas is incisive:

> The fact that money is given once at the beginning of a program rather than apportioned annually as in *Lemon* and *DiCenso* is without constitutional significance. . . . The majority's distinction is in effect that small violations of the First Amendment over a period of years are unconstitutional (see *Lemon* and *DiCenso*) while a huge violation occurring only once is *de minimus*. I cannot agree with such sophistry.

Tilton v. Richardson, 403 U.S. 672, 692, 693 (1971) (Douglas, J., dissenting).

88. Lemon v. Kurtzman, 403 U.S. 602, 613–14 (1971).

89. Tilton v. Richardson, 403 U.S. 672, 685 (1971). Professor Giannella suggested that:

> The nature, function, ends and values of academic scholarship on the college and university level justify considerable state involvement with religion at this level. . . . The church-related college, unlike the church-related elementary or secondary school, does not attempt to form the religious character of the student by maintaining a highly controlled regime designed to inculcate certain values and attitudes.

Giannella, *Religious Liberty, supra* note 45, at 581–83.

90. Tilton v. Richardson, 403 U.S. 672, 685 (1971). All four schools involved in *Tilton* were governed by Catholic religious organizations and the faculties and student bodies at each were predominantly Catholic. There was no required attendance at religious services, although theology courses were required. *Id.* at 686.

91. *Id.* at 686.

religion."[92] The Court characterized the institutional defendants in *Tilton* as "institutions with admittedly religious functions . . . whose predominant higher education mission is to provide their students with a secular education."[93] It is clear that if the Court had sought to, it could have found that the church-related schools of Pennsylvania and Rhode Island were likewise "institutions with admittedly religious functions, but whose predominant . . . education mission is to provide their students with a secular education," since such a determination is, it is submitted, merely an opinion or "prepossession,"[94] and not a finding of fact or conclusion of law.

Justice Brennan pointed to a further complication in these cases, irrespective of the establishment clause, by suggesting that "when a sectarian institution accepts financial aid it becomes obligated under the Equal Protection Clause of the Fourteenth Amendment not to discriminate in admissions policies and faculty selection."[95] The parochial school, as the Rhode Island district court warned, becomes public for more purposes than the Church would wish, and its victory on the establishment clause might well come to mean abandonment of the free exercise clause.[96] The opinion of Mr. Justice Douglas anticipated one such situation. He argued that a faculty member dismissed from a public school can seek redress in the courts and is guaranteed a hearing;[97] but if a faculty member in a parochial school is disciplined or dismissed, he has no legal recourse.[98] Assuming that the above proposition is correct and that teachers in private schools are entitled to due process guarantees by reason of state aid to those schools, it is submitted that the state would again be in the position of violating the Constitution by acting to enforce a teacher's rights (entanglement) or by failing to so act (establishment).

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92. *Id.* at 686-87.

93. *Id.* at 687.

94. McCollum v. Board of Educ., 333 U.S. 203, 237-38 (1947) (Jackson, J., concurring). *See* note 44 *supra.*

95. Lemon v. Kurtzman, 403 U.S. 602, 651 (1971) (Brennan, J.). *See* DiCenso v. Robinson, 316 F. Supp. 112, 121-22 (D.R.I. 1970). Plaintiff-appellants in *Lemon* had also claimed that the Act violated the equal protection clause of the fourteenth amendment by providing state assistance to private institutions that discriminated on racial and religious grounds in their admissions and hiring policies. Lemon v. Kurtzman, 310 F. Supp. 35, 38 (E.D. Pa. 1969). The district court held that no plaintiff had standing to raise that claim because the complaint did not allege that the child of any plaintiff had been denied admission to any nonpublic school on racial or religious grounds. *Id.* at 42. The Court stated that it was unnecessary because of its disposition of the matter on establishment grounds, to reach these questions. Future legislation which satisfies the Court's establishment criteria, however, will have this second issue to face, the parameters of which have as yet only been hinted at by the Court. With regard to "religious discrimination which sectarian schools must of necessity practice," District Court Judge Coffin, in *DiCenso,* warned that:

> Whatever their solution, these problems indicate that we would have to rethink much of our law, especially the law of equal protection, in order to accommodate an institution which receives significant state aid and yet discriminates on principle.

316 F. Supp. at 122.

96. *Id.* at 121-22.

97. Lemon v. Kurtzman, 403 U.S. 602, 636 (1971) (Douglas, J., dissenting), *quoting* L. BOETTNER, ROMAN CATHOLICISM 375 (1962).

98. *Id.*

In Pennsylvania, a new statute has already been enacted to replace the one struck down in *Lemon.* On August 27, 1971, the Governor of Pennsylvania signed into law the Parent Reimbursement Act for Nonpublic Education.[99] The Act appropriates funds for reimbursement to the parents of children attending nonpublic elementary and secondary schools.[100] It is a simple, straightforward attempt to solve a complex problem of church–state relations, and seeks to avoid the evils of entanglement by the expedient of payment to the parent instead of to the institution directly.[101] Parents obtain reimbursement upon submission of a receipted tuition bill or a copy of the executed contract under which a student attended a nonpublic school for the previous year.[102] The new legislation is open to criticism in that it seems to elevate form over substance to an extent that should not be of constitutional dimension. In criticizing the new statute, however, it should be remembered that the form of the now defunct Nonpublic Elementary and Secondary Education Act was crucial to the Court's finding of its unconstitutionality.[103] The prior cases, particularly *Everson* and *Allen,* make it clear that "merely because a secular program may incidently benefit a church in fulfilling its religious mission," this does not transform such legislation into a "law respecting an establishment of religion" forbidden by the first amendment.[104] The

99. PA. STAT. tit. 24, §§ 5701 to 5711 (Supp. 1971).

100. Parents of children in nonpublic schools receive seventy-five dollars per child per year in elementary school, and twice that amount for children in secondary school. The Act provides for the creation of the Pennsylvania Parent Assistance Authority to administer the program, specifically providing that:

> [I]t shall exercise no direction, supervision or control over the policy determinations, personnel, curriculum, program of instruction or any other aspect of the administration or operation of any nonpublic school or schools.

Id. § 5704. The Act has been challenged in the District Court for the Eastern District of Pennsylvania, on much the same grounds as the original statute. Lemon v. Sloan, Civil No. 71–2223 (E.D. Pa., filed Sept. 13, 1971).

101. PA. STAT. tit. 24, § 5706 (Supp. 1971). Professor Freund noted that "the sharp dichotomy between pupil benefit and benefit to the school seems to me a chimerical constitutional criterion," an attitude shared by this author. Freund, *supra* note 45, at 1682.

The "aid to the child" theory was relied on in *Everson* in which the Court upheld "reimbursement to parents of money expended by them for the bus transportation of their children on regular buses operated by the public transportation system." 330 U.S. at 3. It is submitted that such emphasis on the identity of the grantee, the direct beneficiary of government funds, contributes to an unfortunate sense of gamesmanship as to the form which constitutionally valid aid must assume. The new Pennsylvania statute provides aid in a form more analogous to that upheld in *Everson* by direct state payments to parents who choose not to utilize public school facilities. The *Everson* rationale, that aid to the child is acceptable while aid to the school is not, has certainly been eroded by *Tilton.* While not alone constitutionally determinative, it is still a factor of some significance.

102. PA. STAT. tit. 24, §§ 5606 to 5607 (Supp. 1971).

103. *See* text accompanying note 77 *supra.*

104. Lemon v. Kurtzman, 403 U.S. 602, 663–64 (1971) (White, J., concurring in part, dissenting in part). However, *Everson* and *Allen* did involve extending services (bus rides) and goods (textbooks), respectively, to students in sectarian schools which were previously available to public school students. It is submitted that a realistic analysis of the new Pennsylvania act would consider it to be an extension of a public school benefit (no tuition) to students of nonpublic schools. It is arguable, however, that this benefit is not analogous to the forms of aid upheld in *Everson* and *Allen,* particularly in light of the Court's distinction in *Walz* between active and

new statute has at least solved the entanglement problem in that its aid is to the parents, in money, and is distributed with no greater involvement between church and state than is now effected by compulsory attendance and accreditation laws. Since the Court has shown itself unwilling to look beyond the stated legislative purpose to find an unconstitutional intent to advance religion, the only problem remaining is that of its primary effect. If the Court, as newly constituted, were to return to its position in *Allen,* that the secular and religious functions of sectarian elementary and secondary schools were separable, the new statute might well pass constitutional muster. In any event, a decision by the Court in a case concerning such a statute would be extremely helpful to make more explicit the limits on such aid.[105]

The Supreme Court of Ohio has recently upheld the constitutionality of an interesting statutory variation of aid to lower level nonpublic schools.[106] The statute provided for payments to supply auxiliary, nonclassroom services and materials to pupils attending nonpublic schools, for:

> guidance, testing and counseling programs; programs for the deaf, blind, emotionally disturbed, crippled and physically handicapped children; audio visual aids; speech and hearing services; remedial reading programs; educational testing services; programs for the improvement of the educational and cultural status of disadvantaged pupils . . . and for programs of non-religious instruction other than basic classroom instruction . . . on the same basis as such services, materials and programs are provided for pupils in the public schools. . . .[107]

In response to plaintiff's charge that the statute constituted a "direct grant of public money to religious schools which are permeated by a sectarian religious atmosphere,"[108] the court stated that the materials and services provided did not "lend themselves to the religious aura of the recipient sectarian schools," and enhanced "only the secular educational process" which was "properly the concern of the state."[109] Although it found the materials and services involved not to be identical with the textbooks in *Allen* and the free busing in *Everson,* the distinction was

passive aid, since it is *only* available to students in nonpublic schools, and it is a form of *active* aid — payment of a portion of tuition in nonpublic schools. Walz v. Tax Comm'n, 397 U.S. 664, 690–91 (1970) (Brennan, J., concurring).

105. On remand, a three-judge court ruled that the Supreme Court's holding was prospective only. Therefore, the lower court only enjoined payments pursuant to the unconstitutional Act after the date of the decision. This would implicitly allow payment for services rendered prior to the Court's holding. Lemon v. Kurtzman, Civil No. 69–1206 (E.D. Pa., filed Dec. 28, 1971), *appeal docketed,* ____.

106. P.O.A.U. v. Essex, 28 Ohio St. 2d 79, ___ N.E.2d ___ (1971).

107. *Id.* at 80–81, ___ N.E.2d at ___; OHIO REV. CODE ANN. § 3317.06(H) (Page Supp. 1968) (as effective between Dec. 1, 1967 and Aug. 18, 1969). The present statute, to the extent it is similar to the statutes struck down in *Lemon,* is, of course, unconstitutional. The amendments of Aug. 18, 1969 removed the "other than basic classroom instruction" limitation, authorized aid to teachers, and prescribed certain procedures for enforcement of the secular strings attached to the aid. *Id.* (Page Supp. 1971).

108. 28 Ohio St. 2d at 82, ___ N.E.2d at ___.

109. *Id.* at 83, ___ N.E.2d at ___.

viewed by the court as one without significance. The court was of the opinion that all these forms of aid were indistinguishable, for constitutional purposes, in that their religious implications were negligible.[110]

This litigation was unique, however, and different from that in Pennsylvania or Rhode Island in that the parties stipulated that:

> *None of the services, materials, or programs . . . have been provided for use in religious instruction or devotional exercises, and none of said services, materials, or programs . . . are used in, especially suitable for use in, or were selected for use in religious instruction or devotional exercises.*[111]

The court distinguished Ohio's plan from the statutes struck down in *Lemon* and *DiCenso* in that it supplied aid for auxiliary personnel only, as opposed to teachers of secular subjects.[112] Likewise, it distinguished "specialized services, attuned to the needs of the physically, emotionally, and culturally handicapped children" of the state from the "informal, day–to–day teaching situation."[113]

The Ohio court's reaction to the possibility of excessive entanglement under such a statute[114] might presage the rationale which would justify the new Pennsylvania statute.[115] The Ohio court admitted that the program did involve a degree of entanglement between church and state "greater than if no aid were extended at all, but . . . not . . . that degree of 'official and continuing surveillance,' or an initial excessive degree of 'involvement,' . . . such as would render it constitutionally objectionable."[116] It is that elusive, permissible degree of entanglement which each new statute will, undoubtedly, press to the limit.[117]

The federal government has instituted a program of considerable aid to church–related educational institutions and it seems inevitable that a viable state program will emerge from attempts to deal with the Court's strictures on such aid. The need is great, the legislatures are responsive,

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110. *Id.*
111. *Id.* (emphasis supplied by the court).
112. *Id.* at 87, ... N.E.2d at .....
113. *Id.* The new statute is clearly different. *See* note 107 *supra.*
114. 28 Ohio St. 2d at 84–86, ... N.E.2d at .....
115. *See* text accompanying notes 99–102 *supra.*
116. 28 Ohio St. 2d at 85, ... N.E.2d at ...... The specific contacts involved were: a dual approval of applications at the local and state level; a signature of the parent representative on a receipt indicating that none of the services or materials would be used to any extent for religious purposes; the placing of an identifying stamp of ownership on the educational equipment by the local public school district; an on–the–spot periodic inventory of the nonconsumable equipment loaned (the record did not indicate that such checks were used to reveal illegal religious usages, but rather, to ascertain the effects of continuing usage on the physical condition of the items); and the letting of contracts for speech and hearing therapists, remedial reading teachers and guidance counselors. *Id.* at 84–85, ... N.E.2d at .....

The court was of the opinion that the authorized degree of contact between church and state caused by the Ohio Act was "no more than minimal," no more involved than the contact which exists in the reimbursement procedures for busing (*Everson*), the allocation procedure for free books (*Allen*), or the administrative relationships inherent in the tax exemption of church property (*Walz*). *Id.*

117. The "caveat against entanglements" is, indeed, a "blurred, indistinct and variable barrier." Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).

and the public, whose public school system is inextricably entwined with the success or failure of the parochial school systems in this country, does not seem to be aroused against it.

Finally, it should be remembered, as Justice White reminded his colleagues, that the establishment clause coexists in the first amendment with the free exercise clause, and that:

> [F]ree exercise considerations at least counsel against refusing support for students attending parochial schools simply because in that setting they are also being instructed in the tenets of the faith they are constitutionally free to practice.[118]

Denis James Lawler

DOMESTIC RELATIONS — ADOPTION — RELIGION MAY NOT BE THE CONTROLLING FACTOR IN DETERMINING SUITABILITY OF ADOPTIVE PARENTS.

In re Adoption of "E" (N.J. 1971)

Plaintiffs, Mr. and Mrs. Burke, applied to the Children's Aid and Adoption Society of New Jersey seeking to adopt a child, E (Eleanor). In response to the couple's request, the Society in June of 1969 placed E in the Burke home.[1] In May of 1970, after having received the consent of the Society, plaintiffs filed a petition for adoption with the Superior Court of New Jersey. At the hearing, the court questioned the couple as to their religious affiliation and elicited the response that they did not believe in the existence of a Supreme Being.[2] Noting that the judiciary's paramount concern is the best interests of the child, the court determined that the child had a right to believe in God, and thus denied the adoption.[3] Since all other factors had been favorable to the Burkes, the court considered the religious issue to be controlling. On appeal, the Supreme Court of New Jersey certified the case and reversed, *holding* that although religion may constitute a factor for consideration, in the absence of other factual support, it is not and cannot be controlling. *In re Adoption of "E,"* 59 N.J. 36, 279 A.2d 785 (1971).

118. *Id.* at 665 (White, J., concurring in part, dissenting in part).

1. Prior to this instance the Children's Aid and Adoption Society had placed a male child with the plaintiffs. Upon the favorable recommendation of the Society, an award of adoption was made on September 10, 1968. *In re* Adoption of "E," 112 N.J. Super. 326–28, 271 A.2d 27–28 (Essex County Ct. 1970), *rev'd,* 59 N.J. 36, 279 A.2d 785 (1971).

2. John Burke characterized his faith as "humanism." 59 N.J. at ....., 279 A.2d at 788.

3. 112 N.J. Super. at 330, 271 A.2d at 30.

The development of the law of adoption in the United States can be traced to Roman law.[4] Adoption, however, never became part of the English common law; rather, legislation[5] in the states authorized judicial proceedings through which a parent seeking to adopt a child could obtain an adoption decree. The courts thereby acquired supervisory powers over the adoption procedure. A uniquely American contribution to the law of adoption is the *best interests of the child* doctrine.[6] Courts have not been uniform in their determinations as to the content of this doctrine, but the following factors are generally included: the conduct, position and attitude of the parties;[7] the moral character, financial ability, age, intelligence, health and temperament of the petitioners; and the age, sex, health, temperament and other characteristics of the child.[8] The development of this doctrine has formed the basis for one of the more challenging issues facing modern American adoption practice; *i.e.*, religion in adoption.[9]

Courts have taken three paths in dealing with religious objections. Some courts have attributed controlling weight to religious differences between the child and adoptive parents or between the natural parents and adoptive parents, and have denied the decree of adoption on this basis.[10] A second line of decisions has included the religious factor with other considerations in applying the *best interests of the child* doctrine, whereas other courts have disregarded the religious factor entirely.[11]

New York courts have consistently accorded controlling weight to the religious factor in adoption proceedings. The importance of the religious factor is due partly to the statutory scheme,[12] which incorporates

4. H. CLARK, LAW OF DOMESTIC RELATIONS 602-03 (1968). This early Roman law continued in the civil law countries of France and Spain and later developed in Texas and Louisiana, states which followed the civil law background of those countries. *See, e.g.*, Vidal v. Commagere, 13 La. Ann. 516 (1858); Fuselier v. Masse, 4 La. 423 (1832); Teal v. Sevier, 26 Tex. 516 (1863). For a development of this historical background, *see* Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743 (1956).

5. The Massachusetts statute of 1851 is generally considered the forerunner of the modern adoption statutes authorizing judicial supervision of the adoption process. H. CLARK, *supra* note 4, at 603.

6. This doctrine is the primary guideline in custody and adoption cases. It developed independently in the different jurisdictions, but the leading case is Chapsky v. Wood, 26 Kan. 650 (1881). *See* List, *A Child and a Wall: A Study of "Religious Protection" Laws*, 13 BUFFALO L. REV. 9, 14 (1963).

7. Emmons v. Dinelli, 235 Ind. 249, 133 N.E.2d 56 (1956).

8. State *ex rel.* Children's Aid Soc'y v. Hughes, 352 Mo. 384, 177 S.W.2d 474 (1944).

9. *See* Huard, supra note 4, at 753.

10. A refinement of this position is where the decree has been conditioned to the extent that the child must be reared in a religion different from that of the adoptive parents. *See* Comment, *Religion as a Factor in Adoption, Guardianship and Custody*, 54 COLUM. L. REV. 376 (1954).

11. *Id.* at 377.

12. N.Y. DOM. REL. LAW § 113 (McKinney Supp. 1971) reads in pertinent part:

> In making orders of adoption the judge or surrogate when practicable must give custody only to persons of the same religious faith as that of the adoptive child in accordance with article six of the social service law.

N.Y. Soc. SERVICES LAW § 373(3) (McKinney Supp. 1971), *amending* N.Y. Soc. WELFARE LAW § 373(3) (McKinney 1966), reads:

> In appointing guardians of children, and in granting orders of adoption of children, the court shall, when practicable, appoint as such guardians, and give

a religious matching requirement, and to the New York judiciary, which has placed great weight on the natural parents' right to select their child's religion.[13] Reflective of the New York approach is the case of *Matter of Santos*.[14] Two children, ages three and four, were placed with a Jewish woman by their Catholic mother, who agreed to their being raised as Jews. Four years later their natural mother returned, introducing evidence that her religion was Roman Catholic and that the children had been baptized Roman Catholic. In denying the adoption, the court held that it was practicable within the meaning of the statute to preserve for the children their religious faith by placing them in a Catholic institution. More recently, the New York court of appeals in *In re Maxwell's Adoption*[15] held that section 373 of the state's Social Welfare Law[16] contained no absolute requirement that the faith of the adoptive parents be the same as that of the child. The majority interpreted the phrase "when practicable" as allowing the trial court discretion to approve, as adoptive parents, persons of a faith different from that of the child in exceptional circumstances.[17] Although *Maxwell* represents a departure from the mandatory approach of *Santos,* it is nonetheless difficult to definitively state that the viability of *Santos* has been extinguished.[18]

custody through adoption, only to a person or persons of the same religious faith as that of the child.

13. *See* Comment, *supra* note 10, at 378. The importance that is accorded protection of religion oftentimes overshadows even the natural parents' right to select the religion for their child. *See, e.g., Ex parte* Agnello, 72 N.Y.S.2d 186 (Monroe County Sup. Ct. 1947) (custody awarded to a third party as against the natural parent because of religious differences); Adoption of Anonymous, 207 Misc. 240, 137 N.Y.S.2d 720 (Saratoga County Ct. 1955) (adoption decree denied even though natural parents consented to a change in religion).

14. 278 App. Div. 373, 105 N.Y.S.2d 716 (1951). *See also In re* Glavas, 203 Misc. 590, 121 N.Y.S.2d 12 (N.Y. City Dom. Rel. Ct. 1953).

15. 4 N.Y.2d 429, 151 N.E.2d 848, 176 N.Y.S.2d 281 (1958). *See also* Matter of Krenkel, 278 App. Div. 573, 102 N.Y.S.2d 456 (1951).

16. It is significant to note that the *Maxwell* court was not faced with a statutory provision defining the application of "when practicable" as were the courts in *Santos* and *Glavas*. *See* note 14 *supra*. *Compare* N.Y. Soc. SERVICES LAW § 373(3) (McKinney Supp. 1971), *amending* N.Y. Soc. WELFARE LAW § 373(3) (McKinney 1966), *with* N.Y. CITY FAM. CT. ACT § 116(e) (McKinney 1962). The latter provision states:

> The words "when practicable" as used in this section shall be interpreted as being without force or effect if there is a proper or suitable person of the same religious faith or persuasion as that of the child available . . . to whom orders of adoption may be granted; or if there is a duly authorized association, agency, society or institution under the control of persons of the same religious faith or persuasion as that of the child, at the time available and willing to assume the responsibility for the custody of or control over any such child.

17. Here the natural mother had stated at the time she had given consent to the adoption that she embraced no religious faith. The majority reasoned that if the natural mother was permitted to contest an adoption after practicing such a deception, the child would always run the risk of having attachments painfully severed. 4 N.Y.2d at 434, 151 N.E.2d at 850, 176 N.Y.S.2d at 284.

18. *See* Starr v. DeRocco, 29 App. Div. 2d 662, 286 N.Y.S.2d 313 (1968). *Starr* cited *Maxwell* in reversing a lower court that had awarded custody of Catholic children to their Episcopalian uncle. The court held that where there were blood relatives available who professed belief in the same faith as the children, and against whom no cause for rejection existed, it was "practicable" to follow the declared public policy of religious matching. The court took little note of the fact that the uncle had testified that he would rear the infants as Roman Catholics.

A more recent case may indicate a liberal trend in the New York law of adoption. *In re* C., 63 Misc. 2d 1019, 314 N.Y.S.2d 255 (N.Y. City Fam. Ct. 1970).

While the New York courts have retreated somewhat from the mandatory approach of religious matching, the Massachusetts judiciary has stood fast. In *Petitions of Goldman,*[19] the court affirmed the denial of an adoption by a Jewish couple of three year old illegitimate twins who had resided with petitioners continuously from two weeks after their birth. The children had never been baptized, but it was established that the natural mother was Roman Catholic. The court imputed the religion of the natural mother to the children, and interpreted the state's religious matching statute[20] as being applicable even to children too young to understand any religion.

The *Goldman* decision, which has been consistently followed in Massachusetts,[21] represents the most conservative approach taken by any jurisdiction.[22] Massachusetts has emphasized the spiritual welfare of the child to the point where other factors will be examined only after the religious issue is settled.[23]

The Massachusetts legislature, however, through a 1970 statutory amendment, has removed the foundation from the *Goldman* decision.[24]

The court held that section 116(e) of the New York City Family Court Act must be construed to require placement of the child with persons of the same faith only if such placement would neither preclude nor substantially delay adoption. In so holding, the court extended *Maxwell* in two important respects. First, the *Maxwell* court was not faced with statutory language of similar import. The legislative intent is clearly defined in the Family Court Act, but the court construed judicial discretion into its language to enable it to survive a constitutional test. Second, the court placed significantly greater emphasis on the temporal welfare of the child than did the court in *Maxwell.*

19. 331 Mass. 647, 121 N.E.2d 843 (1954), *cert. denied,* 348 U.S. 942 (1955). *See* Pfeffer, *Religion in the Upbringing of Children,* 35 B.U.L. REV. 333, 379–93 (1955).

20. MASS. ANN. LAWS ch. 210, § 5B (1950) provides:

> In making orders for adoption, the judge *when practicable must* give custody only to persons of the same religious faith as that of the child. *In the event that there is a dispute as to the religion of said child, its religion shall be deemed to be that of its mother.* (Emphasis added.)

To substantiate its finding of practicability, the court in *Goldman* relied on oral evidence relating to the availability of Catholic couples willing to adopt twins similarly situated. *Compare* Petition of Duarte, 331 Mass. 747, 122 N.E.2d 890 (1954). There, the same court was unwilling to allow the trial court to take judicial notice of the many applications pending for the adoption of children of the same faith as the child before the court. *Goldman* was distinguished on the ground that the trial court there had made detailed findings of fact. This distinction, however, is open to criticism in view of the fact that the *Goldman* finding of availability differed very little from the judicial notice taken in *Duarte.*

21. *Cf.* Ellis v. McCoy, 332 Mass. 254, 124 N.E.2d 266 (1955). Because of religious differences, the *Ellis* court allowed a Catholic mother to withdraw her consent to the adoption of her child by a Jewish couple. *See* List, *supra* note 6, at 31 n.102.

22. *See also* DEL. CODE ANN. tit. 13, §§ 911(a), 911(b) (1951), *as amended* DEL. CODE ANN. tit. 13, § 911(d) (Supp. 1970); R.I. GEN. LAWS ANN. § 15–7–13 (1956), *as amended* R.I. GEN. LAWS ANN. § 15–7–13 (Supp. 1970).

23. *See* Petitions of Goldman, 331 Mass. 647, 653, 121 N.E.2d 843, 846 (1954), *cert. denied,* 348 U.S. 942 (1955). The court stated that "if neither parent had any religion we suppose the statute [Section 5B] would have no application."

24. MASS. ANN. LAWS ch. 210, § 5B (Supp. 1970) reads in pertinent part:

> In making orders for adoption, the judge shall consider the *need of the child for loving and responsible parental care* and *all factors* relevant to the physical, mental and moral health of the child.
>
> If, *at the time of surrender of the child for adoptive custody,* the parent or parents of said child *requested a religious designation for the child,* the court

While there are no decisions to date interpreting the amended statute, the language therein indicates a legislative intent to subordinate the religious factor and accord the judiciary the opportunity to apply the *best interests of the child* doctrine free from a mandate to match religions.

Illinois and Pennsylvania courts represent a middle view, where the religious affiliation of the parent or child is considered along with the temporal welfare of the child in determining whether the petition for adoption should be granted. In *Cooper v. Hinrichs*,[25] the court interpreted the Illinois statute[26] to be advisory and discretionary, indicative of a legislative intent to consider the religious faith of the adoptive parents as one factor among all the circumstances significant in promoting the general welfare of the child.[27] Pennsylvania, like Illinois, has manifested a desire to recognize both considerations — the parental right to choose the child's religion, and the child's right to have safeguarded his temporal welfare. However, when it is impossible to achieve agreement between them, Pennsylvania courts have chosen the latter.[28]

Pennsylvania, in 1953, enacted a religious matching statute which provided that "whenever possible, the petitioners shall be of the same religious faith as the natural parents of the child to be adopted."[29] Construing this statute, the court in *In re Stone's Adoption*[30] held that the words "whenever possible" indicated a legislative intent to accord the judiciary discretion to determine whether, under the circumstances of each individual case, the welfare of the child would best be promoted by the adoption.

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may grant a petition for adoption of the child only to a person or persons of the religious designation so requested, *unless* a placement for adoptive custody based on such request would not have been in the best interests of the child. (Emphasis added.)

25. 10 Ill. 2d 269, 140 N.E.2d 293 (1957). *See* Comment, *Religion as a Factor in Proceedings for Adoption and Custody of Children*, 1957 U. ILL. L.F. 114, 117.

26. ILL. ANN. STAT. ch. 4, § 9.1-15 (Smith-Hurd 1959) provides:
The welfare of the child shall be the prime consideration in all adoption proceedings. The court in entering a decree of adoption shall, whenever possible, give custody through adoption to a petitioner or petitioners of the same religious belief as that of the child.

27. The lower court had held that the statute required the denial of an adoption whenever a religious difference existed between the child and adopting parents. Cooper v. Hinrichs, 8 Ill. App. 2d 144, 130 N.E.2d 678 (1955).

28. Royer Adoption, 34 Del. Co. 402 (Delaware County, Pa. Orphans' Ct. 1947); *accord, In re* Butcher's Estate, 266 Pa. 479, 109 A. 682 (1920); Conlon's Adoption, 53 Lack. Jur. 65 (Lackawanna County, Pa. Orphans' Ct. 1952); St. George's Adoption, 45 Pa. D. & C. 387 (Erie County Orphans' Ct. 1942).

29. PA. STAT. tit. 1, § 1(d) (1970).

30. 21 Pa. D. & C.2d 730, 57 Lanc. L. Rev. 51 (Lancaster County Orphans' Ct. 1960), *reviewed in* Note, *The Religious Factor in Adoption Proceedings*, 65 DICK. L. REV. 60 (1960); *accord*, Adoption of Suchocki, 60 Schuyl. Leg. Reg. 172 (Columbia County, Pa. Orphans' Ct. 1965); *In re* Barnak, 10 Fiduc. Rptr. 464 (Lehigh County, Pa. Orphans' Ct. 1960). *See also In re* Adoption of S, 15 Bucks Co. L. Rptr. 365 (Bucks County, Pa. Orphans' Ct. 1966), wherein the court found section 1(d) of the Pennsylvania statute not applicable to adoption by a relative. *See* text accompanying note 29 *supra*.

The liberal position concerning religion in the law of adoption is represented by Missouri.[31] Despite stringently worded statutes which, on their face, safeguard the natural parents' choice of religion for their children, the courts have consistently considered only the temporal welfare of the child. Even the lack of religious affiliation has been held not to affect the rights of the adoptive parents.[32]

Missouri's landmark decision, *State ex rel. Baker v. Bird*,[33] construed the religious matching clauses of a guardianship statute as advisory only, indicating that although the state was interested in seeing its children reared in a good moral atmosphere, it could not constitutionally undertake to decide what form of religious affiliation would be in the best interest of the child. Extension of the *Baker* rationale to adoption proceedings was made in *In re Duren*,[34] where the Missouri supreme court held that a Roman Catholic could adopt the Protestant child of her deceased brother over religious objections raised by the child's Protestant grandmother. Reaffirming *Baker*, the court stated that the temporal welfare of the child is the court's primary concern.[35]

The New Jersey supreme court in *In re Adoption of E* declined to adopt the Missouri approach; instead, the court followed the Pennsylvania and Illinois position in permitting consideration of religion as a factor relevant to the disposition of the adoption decree.

In reversing the trial court, the supreme court held that the denial of the adoption based on the sole criterion of lack of religious affiliation amounted to an abuse of discretion, constituting error as a matter of law.[36] The failure of the trial court to direct its attention to the myriad considerations encompassed within the *best interests of the child* doctrine,[37] and

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31. *See, e.g.*, MO. ANN. STAT. § 211.221 (1957) which provides:
In placing a child in or committing a child to the custody of an individual or of a private agency or institution the court shall whenever practicable select either a person, or an agency or institution governed by persons of the same religious faith as that of the parents of such child, or in case of a difference in the religious faith of the parents, then of the religious faith of the child or if the religious faith of the child is not ascertainable, then of the faith of either of the parents.

32. Matter of Clements, 12 Mo. App. 592 (1882), *aff'd on other grounds*, 78 Mo. 352 (1883).

33. 253 Mo. 569, 162 S.W. 119 (1913); *accord, In re* Minnicar's Estate, 141 Cal. App. 2d 703, 297 P.2d 105 (1956); *In re* Walsh's Estate, 100 Cal. App. 2d 194, 223 P.2d 322 (1950).

34. 355 Mo. 1222, 200 S.W.2d 343 (1947). *But see* Parks v. Cook, 180 S.W.2d 64, 69 (Mo. App. 1944), where the court found the guardianship statute not applicable to a custody case.

35. 355 Mo. at 1236, 200 S.W.2d at 352.

36. 59 N.J. at 50, 279 A.2d at 793.

37. The child's safety, happiness, and physical and mental welfare are other relevant factors to be considered by the court. Fantony v. Fantony, 21 N.J. 525, 536, 122 A.2d 593, 598 (1956). *See* Comment, *Measuring the Child's Best Interests — A Study of Incomplete Considerations*, 44 DENVER L.J. 132 (1967). The Child Welfare

the lack of a religious matching requirement in the state's statutory scheme[38] were held determinative.

However, in exceptional situations, special recognition of the religious factor is justified. Instances would include: (1) where the child's prior religious training could not be pursued due to the nature of the environment;[39] (2) where the child's mature adherence to a religion precludes a change in faith without accompanying emotional difficulties;[40] or (3) where the parents' religious beliefs threatened the physical welfare of the child.[41] The court, however, found none of these considerations relevant to the present case; rather, circumstances existed which mitigated against consideration of the religious factor.[42] Thus, in light of the statute and the absence of special circumstances, the court correctly determined that the trial court abused its discretion by denying the adoption because of lack of religious affiliation.[43] The New Jersey supreme court pointed to constitutional impediments as additional grounds for reversal.

Included within the first amendment is the assurance that no law shall be made that will abridge the freedom to exercise one's religious

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League of America, Inc., in its pamphlet, *Standards for Adoption Service: Revised,* set forth the following criteria for evaluation of the adoptive parents:

4.4 Age. — The parents selected for a child should generally be within the age range usual for natural parents of a child of that age . . . .
4.5 Race. — Racial background *in itself* should not determine the selection of the home for a child . . . .
4.6 National, Cultural, and Social Background . . . should not be considerations . . . .
4.7 Religion as a Basis for Selection of Family. — The family selected for a child should be one in which the child will have an opportunity for religious or spiritual and ethical development; *but religious background alone should not be the basis for the selection of a family for a child.*
4.8 Educational Background.
4.9 Physical and Personality Characteristics.
4.10 Geographic Location.
4.11 Children of the Same Family. (Emphasis added.)

CHILD WELFARE LEAGUE OF AMERICA, STANDARDS FOR ADOPTION SERVICE: REVISED 34–35 (1968).

38. N.J. STAT. ANN. tit. 9, § 3–23A(4)(b) (Supp. 1970).

39. T. v. H., 102 N.J. Super. 38, 245 A.2d 221 (Ch. 1968), *aff'd on other grounds,* 110 N.J. Super. 8, 264 A.2d 244 (App. Div. 1970) (Jewish children raised in rural Idaho where there were no available religious facilities, and no other persons of the same faith).

40. Boerger v. Boerger, 26 N.J. Super. 90, 97 A.2d 419 (Ch. 1953).

41. State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1962), *cert. denied,* 371 U.S. 890 (1962) (blood transfusion for child of a Jehovah's Witness).

42. The child E was three weeks old when placed in the Burke home. It is inconceivable that a child this age could have been given religious instruction, and there was no evidence offered that the mother had requested a religious designation for the child. 59 N.J. at 41, 279 A.2d at 788.

43. Additionally, the trial court stated that the child had a right to worship as she saw fit and not to be influenced by parents who did not believe in a Supreme Being. 112 N.J. Super. at 330, 271 A.2d at 30. No such rule of law exists. The right to control the spiritual instruction of a child is an incident of lawful custody. Donahue v. Donahue, 142 N.J. Eq. 701, 61 A.2d 243 (Ct. Err. & App. 1948); People *ex rel.* Portnoy v. Strasser, 303 N.Y. 539, 104 N.E.2d 895 (1952); People *ex rel.* Sisson v. Sisson, 271 N.Y. 285, 2 N.E.2d 660 (1936). Exercise of such discretion would notably reflect only the individual jurist's personal bias for or against a religion or religiosity in general.

beliefs. The Supreme Court has interpreted the concept of religion to include philosophies which do not premise belief in a Supreme Being in the orthodox sense; Buddhism, Taoism, Ethical Culture and Secular Humanism have been recognized as religions in this country.[44] The draft cases of *United States v. Seeger*[45] and *Welsh v. United States*[46] attributed further dimension to the constitutional concept of religion when the Court formulated the following test for religious belief under the Selective Service Act:

> [D]oes the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?[47]

In view of the Supreme Court's formulation of a broad concept for religion, the trial court's finding that the Burkes lacked religious belief, because they did not believe in the existence of a Supreme Being, is not supported by the Supreme Court's position on the question. In addition, the trial court distinguished between what it deemed to be the Burkes' privilege to adopt a child, and the right to do a constitutionally protected act. The New Jersey supreme court quickly dismissed any such distinction, citing *Sherbert v. Verner*[48] in support.

Although the New Jersey court held that the religious factor cannot be controlling, it rejected Chief Justice Weintraub's contention, in concurrence, that its holding was as objectionable on constitutional grounds as was that of the trial court.[49] Measured by the majority's standard, the

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44. Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961).

45. 380 U.S. 163 (1965).

46. 398 U.S. 333 (1970). Welsh had stated that he felt his belief was non-religious, but the majority per Mr. Justice Black rejected what it termed the appeal board's undue emphasis on petitioner's own interpretation. "[F]ew registrants are fully aware of the broad scope of the word 'religious' [as used in the Selective Service Act]." *Id.* at 341.

47. United States v. Seeger, 380 U.S. 163, 184 (1965). In basing this expansive concept of religion on the language of the Selective Service Act, it is at least arguable that the Court intended to limit its application to cases arising thereunder. *But see* Valente, *Aid to Church Related Education — New Directions Without Dogma,* 55 VA. L. REV. 579, 610 (1969). *See also* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee,* 80 HARV. L. REV. 1381, 1425 (1967).

48. 374 U.S. 398 (1963). The Court held unconstitutional a state statute which denied a Sabbatarian unemployment compensation. Petitioner had refused to accept employment which required her to work on Saturday contrary to her religious beliefs. Justice Brennan, expressing the view of the majority, stated:

> [The statute cannot] be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's "right" but merely a "privilege." It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.

Id. at 404. *See also* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439 (1968).

49. Chief Justice Weintraub stated:

> I can think of nothing more unmanageable than an inquiry into a man's religious, spiritual and ethical creed. There is no catalogue of tolerable beliefs. Nor would the nature of man permit one, for man is inherently intolerant as to matters unknowable, and the intensity of his intolerance is twin with the intensity of his views. I assume the majority would never deny adoption "solely" because

plaintiffs might have been denied the adoption if the religious factor and only one additional factor — *e.g.*, age, financial stability, race, or education — had been unfavorable. Application of a religious test[50] or the placing of a condition[51] on the prospective adoptive parents' opportunity to adopt the child would appear violative of the free exercise clause under either court's view since both standards penalize the adoptive parents for adhering to their religious faith. The Supreme Court has indicated that conditions placed upon the opportunity to serve as a notary public[52] and the privilege of receiving unemployment compensation[53] and tax preferences[54] cannot be sanctioned if they infringe first amendment freedoms. Certainly the opportunity to adopt a child is no less important.

While admitting that religion and morality are not equatable,[55] and that in the Burkes' case there existed no valid secular purpose for requiring religious affiliation,[56] the court, nevertheless, announced that an inquiry into prospective adoptive parents' spiritual or ethical beliefs was valid. The majority's rationale rested on the theory that since morality is a legitimate secular consideration under the *best interests of the child* doctrine, and that morality is reflective of one's conduct and conduct is a product of one's beliefs, an inquiry into the adoptive parents' beliefs would serve a valid secular purpose.[57] The difficulty with this analysis is that the conclusion does not follow from the premises. Conceding arguendo that conduct is a product of one's beliefs, the nexus between an inquiry into spiritual beliefs and it serving a valid secular purpose has not been established, since an investigation of the adoptive parents' conduct alone could adequately demonstrate their moral character. A succeeding inquiry

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> of a belief in that area, but if the belief may be considered as the majority say it may, then how much may be charged against an applicant who is a Jehovah's Witness and therefore opposed to blood transfusions, or a Christian Scientist, who, as I understand his faith, would turn to medical aid only as a last resort? And since a man's religious, spiritual and ethical views may be more evident in his position on specific subjects than in his abstract statement of his faith, will it be all right to inquire of his attitude toward the war in Vietnam, or capital punishment, or divorce, or abortion, or perhaps even public welfare, or income taxation, or caveat emptor, in all of which some people find evidence of moral fiber or lack of it?

59 N.J. at 58–59, 279 A.2d at 707 (concurring opinion).

50. Torcaso v. Watkins, 367 U.S. 488 (1961). The Court cited Oliver Ellsworth who reasoned:

> [T]est-laws are utterly ineffectual: they are no security at all; because men of loose principles will, by an external compliance, evade them. If they exclude any persons, it will be honest men, men of principle, who will rather suffer an injury, than act contrary to the dictates of their consciences.

Id. at 494 n.9, *citing* O. Ellsworth, *Letters of "A Landlord,"* in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 170 (P. Ford ed. 1892).

51. *See* Sherbert v. Verner, 374 U.S. 398 (1963); Speiser v. Randall, 357 U.S. 513 (1958).

52. Torcaso v. Watkins, 367 U.S. 488 (1961).

53. Sherbert v. Verner, 374 U.S. 398 (1963).

54. Speiser v. Randall, 357 U.S. 513 (1958).

55. 59 N.J. at 50, 279 A.2d at 792, *see* Broeder & Barrett, *Impact of Religious Factors in Nebraska Adoptions,* 38 NEB. L. REV. 641, 669–71 (1959).

56. 59 N.J. at 50, 279 A.2d at 792–93.

57. *Id.* at 50, 279 A.2d at 792.

into beliefs would be unconstitutional since there exists adequate secular means of securing the same information.[58]

Application of religious qualifications or religious matching requirements also infringe the natural parents' free exercise right where they have consented to the adoption. A court's right to intervene is derived from the state's right as *parens patriae* to protect the general welfare of the child. This concept, however, is not without limitation. The state does not have the power to determine matters of spiritual instruction where the natural parents lawfully hold custody.[59] By its very nature, this right to religiously guide their child is encompassed within the parents' right to free exercise of religion. Thus, when the natural parents consent to a cross-religious adoption, they are in effect determining that the child's religion should be that of the adoptive parents. Intervention by the state by imposition of a religious matching requirement would violate the natural parents' first amendment freedoms.[60] Permissible limitations on an individual's free exercise right have evolved in the areas of public health, morality and the physical welfare of children. The Supreme Court has shown a tendency to deviate from established principle where strong policy considerations exist. It has upheld a state compulsory vaccination requirement,[61] a polygamy conviction of a Mormon[62] and a statute prohibiting public sale of religious information by females under age eighteen,[63] even though each activity was performed pursuant to religious principle. However, in the area of adoption, strong policy considerations operate which do not support intervention by the state on religious grounds. The abundance of children and the lack of potential willing parents compel reduction of the barriers to adoptions.[64] Additionally, the cost of foster care and the inability of the state to provide for secure emotional develop-

58. *See* School Dist. v. Schempp, 374 U.S. 203, 294–95 (1963) (concurring opinion); Braunfeld v. Brown, 366 U.S. 599, 607 (1961). Of further significance is that an inquiry into an individual's beliefs relies heavily on the expression of those beliefs in court, and the reliability of such evidence is seriously suspect in view of its subjective nature.

59. *See* Kilgrow v. Kilgrow, 268 Ala. 475, 107 So. 2d 885 (1958); People *ex rel.* Sisson v. Sisson, 271 N.Y. 285, 2 N.E.2d 660 (1936). Professor Giannella has stated:

> [Religious orphanages that care for wards of the state] stand *in loco parentis* to their charges and, to the extent that they can properly exercise the prerogatives of parents, they can control the religious formation of the children intrusted to them.

Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle,* 81 HARV. L. REV. 513, 560 (1968).

60. *See* List, *supra* note 6, at 54; Comment, *The Religious Factor in New York Adoption Proceedings,* 18 SYRACUSE L. REV. 825, 833 (1967); Note, *Constitutionality of Mandatory Religious Requirements in Child Care,* 64 YALE L.J. 772, 784 (1955).

61. Jacobson v. Massachusetts, 197 U.S. 11 (1905). Public welfare also has been held to be a legitimate state concern justifying limitations on an individual's free exercise right. Braunfeld v. Brown, 366 U.S. 599 (1961); McGowan v. Maryland, 366 U.S. 420 (1961).

62. Reynolds v. United States, 98 U.S. 145 (1878).

63. Prince v. Massachusetts, 321 U.S. 158 (1944). *But see* Giannella, *supra* note 47, at 1396.

64. Morgenstern, *The New Face of Adoption,* NEWSWEEK, Sept. 13, 1971, at 72. *See also* Note, *Religious Factors in Adoption,* 28 IND. L.J. 401, 402 (1953).

ment raise serious problems,[65] indicating that consideration of religion and other limiting factors not related to the temporal welfare of the child have a counter-productive effect.

Special circumstances pose different problems. For instance, where the natural parents, incident to lawful custody, have designated a religious denomination for the child,[66] the court, in considering this designation, would not be considering religion per se, but would be granting recognition to the natural parents' free exercise right under the first amendment. Thus, there would be a permissible limitation on the first amendment right of the adoptive parents due to the paramount concern for the natural parents' constitutional right.[67] Recognition, however, should not extend beyond a religious designation made incident to lawful custody. Where the courts recognize parental rights after the natural parents have abandoned the child,[68] the limitation on the adoptive parents' first amendment freedoms cannot be justified.

Another instance is where the child has been reared in a particular faith and is old enough to maturely adhere to it. Limitation on the adoptive parents' free exercise right may be justified on either of two grounds. First, the court could recognize the child's free exercise right in which case this right would be of paramount concern under the *best interests of the child* doctrine. Second, the court may have a valid secular aim; *i.e.,* preserving the psychological or emotional welfare of the child. This would not constitute consideration of religion per se, but would be a protection of the child's temporal welfare.[69]

The establishment clause of the first amendment also represents a bar to a court's involvement with the religious factor in adoption proceedings. In the instant case the New Jersey supreme court recognized that the judiciary is incompetent to impose religious qualifications on the adoptive parents' opportunity to adopt the child.[70] The United States Supreme Court has consistently held that the state must maintain a posture of strict neutrality on the issue of religion.[71] However, not only do religious qualifications contravene the establishment clause, but judicial imputation

65. R. ISAAC, ADOPTING A CHILD TODAY 148–49 (1965).

66. The term "religious designation," as used within the scope of this Note, means parental stipulation of the child's religion at the time of adoption. It does not pertain to religious induction rites to which the child may have been exposed, *e.g.,* baptism or circumcision.

67. Even this position has been criticized on the basis that the natural parents do not have the right to control other aspects of the child's development after adoption, and therefore should not have the right to control the child's religious upbringing. H. CLARK, *supra* note 4, at 647.

68. *In re* Santos, 278 App. Div. 373, 105 N.Y.S.2d 716 (1951). *See* text accompanying note 14 *infra.*

69. Where the child is too young to maturely adhere to a religious faith, no relation would exist between the religious factor and the emotional factor. In this situation, some other legitimate secular interest must be found to support consideration of religion. Michigan, for example, no longer permits consideration of religion where the child is below the age of eight. *See* Morgenstern, *supra* note 64, at 72.

70. 59 N.J. at 53, 279 A.2d at 794.

71. *See* Torcaso v. Watkins, 367 U.S. 488, 494–95 (1961); McCollum v. Board of Educ., 333 U.S. 203, 210 (1948); Everson v. Board of Educ., 330 U.S. 1, 15 (1947).

of religion to a child is subject to the same constitutional criticism.[72] This is true whether practiced pursuant to either the New York or Pennsylvania approaches. By granting the force of law to baptismal or other inductive rites, to the exclusion of other relevant factors,[73] or by presuming the child's religion to be that of the natural parents, in the absence of parental designation, the courts do violence to the spirit of neutrality.[74] Recent decisions may indicate a trend toward relaxing the requirement of strict neutrality, most noticeably in the areas of tax exemptions to religious institutions[75] and aid to church-related education.[76] There, strong policy considerations have justified the Court's accommodation to the religious institution. However, the underlying policy considerations which help support these holdings do not operate in the area of adoption. On the contrary, the policy factors that do exist support adherence to the concept of strict neutrality.[77]

Assuming that the Burkes' Humanism does not fall within the constitutional concept of religion, the denial of the adoption could be challenged on equal protection grounds. While the trial court decided that the child had a right to worship as she saw fit[78] — a free exercise holding — the essential preliminary issue was whether the court was constitutionally competent to determine that a particular religion or religiosity in general would better serve the general welfare of the child. To follow the court's reasoning would foreclose the opportunity to adopt by persons holding unorthodox beliefs.[79] Mr. Justice Jackson, expressing the equal protection precept, stated:

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72. *See* Ramsey, *The Legal Imputation of Religion to an Infant in Adoption Proceedings,* 34 N.Y.U.L. REV. 649, 681 (1959). *But see* List, *supra* note 6, at 54.

73. *See* Note, 65 HARV. L. REV. 694, 695 (1952).

74. Zorach v. Clauson, 343 U.S. 306 (1952). Speaking for the majority, Mr. Justice Douglas stated:

> The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction.

Id. at 314.

75. Walz v. Tax Comm'n, 397 U.S. 664 (1970) (upholding a property tax exemption to religious organizations for property used solely for religious purposes).

76. In Board of Educ. v. Allen, 392 U.S. 236 (1968), the Court upheld a state statute which made provision for loans of secular textbooks to parochial school students. Tilton v. Richardson, 403 U.S. 672 (1971), upheld Title I of the Higher Education Facilities Act of 1963, which provided for construction grants to sectarian schools for buildings and facilities used exclusively for secular education. *But see* Lemon v. Kurtzman, 403 U.S. 602 (1971), *noted* in 17 VILL. L. REV. 574 (1972), where the Court struck down a state statute which directly reimbursed nonpublic schools for actual instructional expenditures. *See generally* Giannella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement,* 1971 SUP. CT. REV. 147; Valente, *supra* note 47.

77. *See* text accompanying notes 64 & 65 *supra.*

78. 112 N.J. Super. at 330, 271 A.2d at 30.

79. One commentator has indicated that it is customary in New York, when placing foundlings whose parents' religion is not known, to allocate them among Catholic, Protestant and Jewish applicants in the proportion which the three groups appear in the general population. H. CLARK, *supra* note 4, at 647 n.61.

> [The states] must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation.[80]

The *best interests of the child* doctrine, developed for the purpose of securing a beneficial adoption for the child,[81] validly includes consideration of the adoptive parents' moral character. However, since morality "does not lie within the exclusive province of religion,"[82] discrimination based on religion does not bear a rational relation to the purpose of the doctrine. Furthermore, classifications based on religion,[83] as with those based on race,[84] are subject to a higher standard of scrutiny under the equal protection clause. There must exist a compelling state interest and a necessary relation between that interest and the classification. Here, that nexus has not been established, and the fact that religion plays a lesser role in the eventual disposition of the adoption decree should be of no moment.

Mandatory religious matching statutes are likewise subject to constitutional criticism on equal protection grounds[85] if we treat the prospective adoptive parents and the child as a unit. Where a difference in religious background exists, the adoptive unit is denied the opportunity to adopt and to live a normal life, without application of the *best interests of the child* doctrine. Where religious backgrounds match, the adoptive unit is afforded the application of the doctrine to determine the disposition of the decree. The difference in application of law between the two classes constitutes a violation of equal protection because it bears no rational relation to a compelling state interest.

Closely allied to the equal protection consideration is the argument that a child is denied due process of law when, because of mandatory religious matching standards, his temporal welfare is not considered.[86]

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80. Railway Express Agency v. New York, 336 U.S. 106, 112 (1949) (concurring opinion).

81. *See* note 37 *supra*.

It has been suggested that:

> [Child placement] laws also fulfill important and well-recognized needs in the adult population — the need of childless couples for a family and the need of natural parents (and especially the unwed mother) who cannot care for their children of a social mechanism to assure them that the welfare of their children will be protected. With regard to these interests, the object of the adoption law is to give . . . natural parents some control of the choice of adoptive parents (generally, consent is required).

List, *supra* note 6, at 51.

82. 59 N.J. at 50, 279 A.2d at 792–3.

83. In Sherbert v. Verner, 374 U.S. 398 (1963), the Court stated:

> It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation. . . ."

Id. at 406, *quoting* Thomas v. Collins, 323 U.S. 516, 530 (1945).

84. Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Board of Educ., 347 U.S. 483 (1954).

85. *See* List, *supra* note 6, at 51; Comment, *supra* note 60, at 834.

86. *See* Comment, *supra* note 60, at 834; Note, *supra* note 60, at 783.

Interpreting the due process clause, the Court in *Meyer v. Nebraska*[87] posited that liberty, as a concept, included "the right of the individual to . . . marry, establish a home and bring up children . . . ."[88] It is submitted that encompassed within this concept is the child's corollary right to live in a home and enjoy a normal life. The application of mandatory religious matching standards prevents consideration of other relevant factors and consequently denies the child his fundamental right to protection of his general welfare.[89] Due process requirements strongly suggest at the very least that the child's temporal welfare be considered before a disposition of the adoption decree is made. Without this fundamental safeguard, the entire purpose for the adoption proceeding is frustrated.

Constitutional analysis and consideration of policy leads to the conclusion that the judicial attitude adopted by Missouri, and advocated by Chief Justice Weintraub represents the most enlightened view on the issue of religion in adoption. Unfortunately, the law is slow to change and, at present, a trend toward holding the religious protection laws unconstitutional has not been established. Unmistakably clear, however, is the fact that increasing social pressures on the courts will undoubtedly have a profound impact on the weight accorded the religious factor, among other exclusionary factors, in the future.

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87. 262 U.S. 390 (1923).
88. *Id.* at 399.
89. *See* Note, *supra* note 60, at 783.